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UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

Addendum

"Article II

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

"2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

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TRAVAUX PRÉPARATOIRES ON ARTICLE II

The *travaux préparatoires* on article II as adopted in 1958 are contained in the following documents:

Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and comments by Governments and Organizations:

- Report of the Committee on the Enforcement of International Arbitral Awards: E/2704 and Annex.
- Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: E/2822, Annexes I-II; E/2822/Add.1, Annex I; E/2822/Add.2, Annex I; E/2822/Add.4, Annex I; E/2822/Add.5, Annex I; E/CONF.26/3/Add.1.

United Nations Conference on International Commercial Arbitration:

- Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/7; E/CONF.26/L.8; E/CONF.26/L.17; E/CONF.26/L.18; E/CONF.26/L.18; E/CONF.26/L.20; E/CONF.26/L.22; E/CONF.26/L.31; E/CONF.26/C.3/L.1; E/CONF.26/L.34.
- Comparison of Drafts Relating to Articles III, IV and V of the Draft Convention: E/CONF.26/L.33.
- Statement submitted by the Observer of the Hague Conference on Private International Law: E/CONF.26/L.36.
- Further Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/L.40.
- Text of Additional Protocol on the Validity of Arbitral Agreements Submitted by Working Party No. 2: E/CONF.26/L.52.
- Amendments by Governmental Delegations to the Drafts Submitted by the Working Parties and Further Suggested Drafts: F/CONF.26/L.45; E/CONF.26/C.3/L.3; E/CONF.26/L.53; E/CONF.26/L.54.
- Text of New Articles to be Included in the Convention Adopted by the Conference: E/CONF.26/L.59.
- Text of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as Provisionally Approved by the Drafting Committee: E/CONF.26/L.61; E/CONF.26/8.

Summary records:

- Summary Records of the Seventh, Ninth, Eleventh, Twelfth, Thirteenth, Fourteenth, Seventeenth, Twenty-first, Twenty-third and Twenty-fourth Meetings of the United Nations Conference on International Commercial Arbitration: E/CONF.26/SR.7; E/CONF.26/SR.9; E/CONF.26/SR.11; E/CONF.26/SR.12; E/CONF.26/SR.13; E/CONF.26/SR.14; E/CONF.26/SR.17; E/CONF.26/SR.21; E/CONF.26/SR.23; E/CONF.26/SR.24.
- Summary Record of the Fourth Meeting of the Committee on the Enforcement of International Arbitral Awards: E/AC.42/SR.4.

(Available on the Internet at www.uncitral.org)

INTRODUCTION

1. Article II governs the recognition and enforcement of arbitration agreements. Provided that certain conditions are satisfied, article II mandates Contracting States to recognize an agreement in writing to submit disputes to arbitration and to enforce such an agreement by referring the parties to arbitration.

2. The scope of the New York Convention was initially meant to be limited to the recognition and enforcement of arbitral awards to the exclusion of arbitration agreements.[1] While issues pertaining to the validity of arbitration agreements had arisen in the context of discussions about the recognition and enforcement of arbitral awards in connection with articles IV(1)(b) and V(1)(a) of the Convention,[2] it was only during the Conference, less than three weeks before the Convention was adopted, that the drafters decided to include a specific provision on the recognition and enforcement of arbitration agreements.[3] By that time, most of the other provisions had already been adopted and they were not modified to reflect this late addition.[4] This explains why the recognition and enforcement of arbitration agreements is not mentioned in the Convention's title or in any other provisions, including articles I and VII.

3. For example, article I(1) which defines the scope of application of the Convention does not deal with arbitration agreements. However, the commercial reservation in article I(3) which applies to "differences arising out of legal relationships" encompasses, by its own terms, arbitration agreements set out in article II. By contrast, the Convention does not explicitly settle the issue whether the reciprocity reservation in article I(3) which deals with "the recognition and enforcement of awards made [...] in the territory of another Contracting State" applies mutadis mutandis to arbitration agreements.

4. Certain courts have reasoned by analogy to article I(1) that the Convention applies only to arbitration agreements providing for a seat in a State other than the

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[1] *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/2704, E/AC.42/4/Rev.1, at 6, paras. 18-19. The Polish (E/CONF.26/7) and Swedish (E/CONF.26/L.8) proposals to add a provision on the validity of arbitration clauses were discussed during the Seventh and Ninth Meeting of the Conference but were ultimately rejected.

[2] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Eleventh (E/CONF.26/SR.11, at 7-12), Twelfth (E/CONF.26/SR.12, at 3-6), Thirteenth (E/CONF.26/SR.13, at 4-7 and 9-11), Fourteenth (E/CONF.26/SR.14, at 4-5 and 7-9), Seventeenth (E/CONF.26/SR.17, at 4-6) Meetings.

[3] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-first Meeting, E/CONF.26/SR.21, at 17. See E/2822 Annexes I and II.

[4] Ibid.

State of the court seized with the dispute.[5] This interpretation has been endorsed by certain commentators.[6]

5. Other commentators have suggested that article II was meant to apply to the recognition and enforcement of all arbitration agreements irrespective of the seat. Professor Minoli, for example, points out that the proposal by Israel (which was further modified by Italy) to introduce a general reservation clause enabling States not to apply article II in certain situations had been rejected during the Conference. This, suggests Professor Minoli, leaves no doubt as to the intention of the drafters of the New York Convention that article II should cover both domestic and international situations without any limitations.[7] Another early commentator of the Convention also took the view that article II, unlike the 1923 Geneva Protocol, does not require the parties to be subject to the jurisdiction of different Contracting States, thereby giving the provision a general application.[8] Other commentators have suggested that the New York Convention did not intend to incorporate any territorial limitations on the scope of application on arbitration agreements falling within the scope of article II.[9]

6. In that spirit, the High Court of Delhi held that, on the face of article II, there is no "express or implied limitation or fetter which calls for recognition and enforcement of only those arbitration agreements which will result in foreign awards. Such a construction cannot be placed upon the said article as this would go against the spirit and grain of the convention". The court concluded that "the New York Convention will apply to an arbitration agreement if it has a foreign element or flavour involving international trade and commerce even though such an agreement does not lead to a foreign award (...)."[10] The same approach has been adopted by

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[5] *Kaverit Steel and Crane v. Kone Corp.*, Alberta Court of Queen's Bench, Canada, 14 May 1991; *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; Federal Tribunal, Switzerland, 21 March 1995, 5C.215/1994/lit; Federal Tribunal, Switzerland, 25 October 2010, 4 A 279/2010; *X v. Y*, Federal Tribunal, Switzerland, 9 January 2008, 4A_436/2007.

[6] Reinmar Wolff, *Commentary on Article II*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS — COMMENTARY 85, at 99-104 (R. Wolff ed., 2012); ICCA'S GUIDE TO THE INTERPRETATION OF THE 1958 NEW YORK CONVENTION: A HANDBOOK FOR JUDGES (P. Sanders ed., 2011), at 19; Jean-François Poudret, Gabriel Cottier, *Remarques sur l'application de l'Article II de la Convention de New York*, 1995 ASA BULL. 383, at 384.

[7] Eugenio Minoli, *L'Italie et la Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères*, in INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 199, at 203 (P. Sanders ed., 1967). See also the *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-First Meeting, E/CONF.26/SR.21, at 14, the comments by the representative of Norway that "a reservation to the effect that the Convention would apply to disputes of an international character was essential" and by the representative of Italy that "his proposal was designed to ensure that the Convention would not apply to disputes which were not international."

[8] Frédéric-Edouard Klein, *Autonomie de la volonté et arbitrage (suite et fin)*, 1958 R.C.D.I.P. 479, at 491.

[9] See, *e.g.*, Philippe Fouchard, *La levée par la France de sa réserve de commercialité pour l'application de la Convention de New York*, 1990 REV. ARB. 571, reasoning that given France's withdrawal of the commercial reservation, article II applies to all arbitration agreements.

[10] *Gas Authority of India Ltd. v. SPIE-CAPAG SA and ors*, High Court of Delhi, India, 15 October 1993, Suit No. 1440; IA No. 5206.

United States courts pursuant to the Federal Arbitration Act and the New York Convention.[11] French courts have similarly taken the view that the Convention should apply to a challenge to the existence or validity of an arbitration agreement, and that this was not restricted in any way by the language of article I.[12]

7. Article II governs the form and effects of arbitration agreements. Article II(1) requires each Contracting State to recognize an "agreement in writing" under which the parties undertake to submit their disputes to arbitration. This provision has been interpreted as establishing a presumption that arbitration agreements are valid.[13] Article II(2), which governs the form of "agreements in writing", covers agreements that have been "signed by the parties or contained in an exchange of letters or telegrams."

8. To ensure that arbitration agreements are complied with, article II(3) requires national courts seized of a matter covered by an arbitration agreement to refer the parties to arbitration, "unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The underlying principle that the parties to an arbitration agreement are required to honour their undertaking to submit to arbitration any dispute covered by their arbitration agreement is given effect by the mandatory requirement on national courts to refer the parties to arbitration when presented with a valid arbitration agreement. It follows that national courts are prohibited from hearing the merits of such disputes. In accordance with the principle of "competence-competence", which empowers arbitrators to rule on their own jurisdiction, a challenge to the existence or validity of an arbitration agreement will not prevent an arbitral tribunal from proceeding with the arbitration.[14]

9. By accepting the principle of "competence-competence", national courts do not relinquish their power to review the existence and validity of an arbitration agreement as they recover their power of full scrutiny of the arbitration agreement at the end of the arbitral process, once the award is rendered by the arbitral tribunal. The question arises whether, at the pre-award stage, in complying with their obligation to refer the parties to arbitration pursuant to article II(3), national courts could conduct a full or a limited review of the arbitration agreement to determine whether a valid arbitration agreement exists. In some jurisdictions, courts have limited their scrutiny to a prima facie review, thereby leaving the arbitrators to be the first to fully decide the issue of their jurisdiction. This principle, sometimes referred to as the 'negative effect of competence-competence", gives arbitrators

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[11] *Fred Freudensprung v. Offshore Technical Services, Inc., et al.*, Court of Appeals, Fifth Circuit, United States of America, 9 August 2004, 03-20226.

[12] *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Appeal of Versailles, France, 23 January 1991, upheld by *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Cassation, France, 9 November 1993, 91-15.194.

[13] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 156; ICCA'S GUIDE, supra note 6, at 37.

[14] PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965), para. 202; Antonias Dimolitsa, *Separability and Kompetenz-Kompetenz*, in ICCA CONGRESS SERIES NO. 9, IMPROVING THE EFFICIENCY OF ARBITRATION AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION217 (A.J. van den Berg ed., 1999).

priority in determining their jurisdiction, while the courts keep the power to conduct a full review of the existence, validity and scope of the arbitration agreement at the end of the arbitral process.[15] In other jurisdictions, courts conduct a full review of the existence, validity and scope of the arbitration agreement in order to determine whether to refer the parties to arbitration.

10. The standard to be applied by the courts in determining whether the agreement is "null and void, inoperative or incapable of being performed" when deciding whether to refer the parties to arbitration therefore remains debated.[16]

ANALYSIS

ARTICLE II(1)

A. The obligation to recognize an agreement in writing

11. Article II(1) provides that, when certain conditions are met, Contracting States "shall" recognize an agreement in writing to arbitrate.

12. The obligation to recognize an "agreement in writing" is widely accepted by national courts. The Supreme Court of the United States has held that the compulsory language "shall" in article II(1) leaves courts with no discretion as they must recognize the arbitration agreement in accordance with the clear provisions of the Federal Arbitration Act and the New York Convention.[17] Similarly, the Swiss Federal Tribunal has interpreted article II as obliging Contracting States to recognize the validity and effect of an arbitration agreement.[18] The mandatory nature of the requirement to recognize and enforce arbitration agreements has been confirmed by decisions in most jurisdictions.[19]

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[15] Emmanuel Gaillard, Yas Banifatemi, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y.L.J. (December 2005), at 3; Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, *Article II*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 37, at 95-96 (H. Kronke, P. Nacimiento, D. Otto, N.C. Port eds., 2010).

[16] For a full discussion, see infra [A/CN.9/814, Add.2], paras. 79-99.

[17] *Scherk v. Alberto-Culver Company*, Supreme Court, United States of America, 17 June 1974, 73-781. See also: *Lindo (Nicaragua) v. NCL (Bahamas), Ltd.*, Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367; *Ernesto Francisco v. Stolt Achievement MT*, Court of Appeals, Fifth Circuit, United States of America, 4 June 2002, 01-30694.

[18] *Tradax Export SA v. Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984.

[19] Australia: *Seeley International Pty Ltd. v. Electra Air*, Federal Court, Australia, 29 January 2008, SAD 157 of 2007; Colombia: *Sunward Overseas SA v. Servicios Maritimos Limitada Semar*, Supreme Court of Justice, Colombia, 20 November 1992, 472; France: *SA C.F.T.E. v. Jacques Dechavanne*, Court of Appeal of Grenoble, France, 13 September 1993; Hong Kong: *Westco Airconditioning Ltd. v. Sui Chong Construction & Engineering Co Ltd.*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, A12848; India: *Renusagar Power Co Ltd. v. General Electric Company and anor.*, Supreme Court, India, 16 August 1984; Italy: *Louis Dreyfus Corporation of New York v. Oriana Soc. di Navigazione S.p.a*, Court of Cassation, Italy, 27 February 1970, 470, I Y.B. COM. ARB. 189 (1976).

B. Meaning of "agreement"

13. Article II(1) deals with the agreement to arbitrate. When deciding whether to enforce an arbitration agreement, courts rely on the consent of the parties to establish whether they have agreed to submit the underlying dispute to arbitration.

14. The task of a court in determining an agreement to arbitration has been defined as follows by the Supreme Court of the United States under both the Federal Arbitration Act and the New York Convention: "the first task of a court asked to compel arbitration of a dispute is to determine whether the parties agreed to arbitrate" the dispute.[20] As confirmed by an Australian court, consent falls to be assessed on a case-by-case basis.[21]

15. Reported case law in various jurisdictions applying the Convention[22] shows that parties were referred to arbitration pursuant to article II(3) when courts have found that the parties had consented to arbitration. Consent to arbitration has been found in a variety of situations, including when the parties (i) participated in the negotiation of the contract, (ii) participated in the performance of the contract, (iii) participated in both the negotiation and performance of the contract, (iv) had knowledge of the arbitration agreement, or (v) participated in the arbitral proceedings without raising any objection to the arbitral tribunal's jurisdiction.

16. *First*, a United States court held that participation in the negotiation of the contract containing the arbitration clause through an exchange of documents evidences the parties' consent to arbitrate any dispute arising out of that contract, thereby satisfying the requirements of article II.[23] In so ruling, the court noted that the party had affixed its stamp to the broker's slip as further evidence of consent.

17. *Second*, evidence of consent has been found in the parties' conduct in performing the contract. In situations where a party does not sign the contract or return a written confirmation, but nevertheless performs its obligations, many courts have held that such conduct amounts to a tacit acceptance of the terms of the

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[20] *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, Supreme Court, United States of America, 2 July 1985, 3-1569.

[21] *ACD Tridon v. Tridon Australia*, Supreme Court of New South Wales, Australia, 4 October 2002, 5738 of 2001. See also: *Moscow Dynamo v. Alexander M. Ovechkin*, District Court, District of Columbia, United States of America, 18 January 2006, 05-2245 (EGS) where the United States District Court of Colombia denied enforcement of the alleged arbitration clause as it was unable to find "*factual predicate or legal authority to support [the] argument that a written agreement to arbitrate can be found absent a written exchange demonstrating both parties' agreement to arbitrate with one another.*"

[22] This study is based on more than 350 decisions from Australia, Belgium, Brazil, Canada, China, Colombia, Egypt, France, Germany, Hong Kong, India, Italy, the Russian Federation, Spain, Switzerland, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Venezuela. These decisions can be found on the Internet at www.newyorkconvention1958.org.

[23] *Chloe Z Fishing Co. Inc., et al. v. Odyssey Re (London) Ltd., formerly known as Sphere Drake Insurance, P.L.C., et al.*, District Court, Southern District of California, United States of America, 26 April 2000, 109 F.Supp.2d 1236 (2000).

contract, including the arbitration agreement.[24] For example, the Indian Supreme Court has enforced an arbitral award notwithstanding the fact that the arbitration agreement was neither signed nor contained in an exchange of documents. It held that the party's conduct, in particular its opening of the letters of credit in reliance on the contract and its invoking the contract's force majeure clause, demonstrated an acceptance of the terms of the written contract, including the arbitration clause.[25] Following the same reasoning, but applying French law on the basis of the "more-favourable-right" provision,[26] a French court upheld an arbitration agreement contained in a booking note on the ground that the parties had performed the booking note. The court held that since the parties had knowledge of the booking note, which constituted the parties' sole "meeting of minds", they were bound by the arbitration agreement contained therein.[27]

18. *Third*, when a party that did not sign the contract containing the arbitration agreement had nevertheless participated in the negotiation of, and performed obligations under, that contract, certain courts have referred that non-signatory to arbitration. In a case concerning an action to set aside an award, but dealing with the issue of the binding character of an arbitration agreement on a non-signatory, the Paris Court of Appeal confirmed that the parent company that participated in the negotiation of and assumed obligations under the main contract was bound by the arbitration agreement, despite not being a party to the main contract.[28] However, this approach is not universally accepted. For instance, in the *Dallah* case, the English Supreme Court, relying on the New York Convention, refused to grant leave to a party seeking to enforce an award rendered against the Islamic Republic of Pakistan on the grounds that there was no evidence that the common intention of the parties was to add the Government of Pakistan as a party to the main contract,

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[24] *Metropolitan Steel Corporation Ltd. v. Macsteel International U.K. Ltd.*, High Court of Karachi, Pakistan, 7 March 2006, XXXII Y.B. COM. ARB. 449 (2007), at 451-452; *Standard Bent Glass Corp. v. Glassrobots OY [Fin.]*, Court of Appeals, Third Circuit, United States of America, 20 June 2003, 02-2169; *Compagnie de Navigation et Transports SA v. MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; *Smita Conductors Ltd. v. Euro Alloys Ltd.*, Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996. *Contra: Concordia Trading B.V. v. Nantong Gangde Oil Co., Ltd.*, Supreme People's Court, China, 3 August 2009, [2009] MinSiTaZi No. 22.

[25] *Smita Conductors Ltd. v. Euro Alloys Ltd.*, Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996.

[26] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 81; Emmanuel Gaillard, *The Relationship of the New York Convention with other Treaties and with Domestic Law*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 69, at 70 (E. Gaillard, D. Di Pietro eds., 2008).

[27] *SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG*, Court of Appeal of Basse Terre, France, 18 April 2005.

[28] *Société Kis France et autres v. Société Générale et autres*, Court of Appeal of Paris, France, 31 October 1989, 1992 REV. ARB. 90. For a similar reasoning, finding that the Government of Turkmenistan "acted as the alter ego of [a State owned entity] in regard to this Joint Venture with [the claimant in the arbitration]": *Bridas S.A.P.I.C., Bridas Energy International, Ltd., Intercontinental Oil and Gas Ventures, Ltd., and Bridas Corp v. Government of Turkmenistan*, Court of Appeals, Fifth Circuit, United States of America, 21 April 2006, 04-20842.

despite its participating in negotiations and in the performance of certain obligations under that contract.[29]

19. *Fourth*, consent has also been found in situations where a party had knowledge of the arbitration agreement. For instance, when the arbitration agreement is printed on the back of the contract (or contained in general terms and conditions printed on the back of the contract), parties have been deemed to have knowledge of the agreement to arbitrate as they had the opportunity to review the arbitration agreement.[30] In this vein, in a dispute where the arbitration agreement was contained in a document other than the main contract, the Italian Court of Cassation noted that, in order to establish the parties' consent to an arbitration agreement, the parties had to have knowledge of the arbitration agreement through a specific reference to it in the main contract ("*per relationem perfecta*").[31]

20. In some jurisdictions, parties are deemed to have knowledge of the arbitration agreement when, irrespective of whether they had actual knowledge of the arbitration agreement, they should reasonably have known about it. In such cases, courts will enforce arbitration agreements when parties are aware of the arbitration agreement or should have been aware of the arbitration agreement. For instance, the Italian Court of Cassation now recognizes that, when the parties are professional businessmen who should be aware of the content of general terms and conditions in their field, a generic reference to such terms and conditions ("*per relationem imperfecta*") satisfies the requirement of article II of the Convention.[32] German courts also admit that consent can be implied from relevant international trade usages when the contract is typical of the industry and the parties are active in the relevant field of business.[33]

21. Some courts have also ruled that parties are bound by an arbitration agreement incorporated by reference on the grounds that they should have been aware of its terms. It is indeed very common in international trade for parties not to set out the terms of their contract in detail, but instead to refer to separate documents, such as general conditions and standard-form agreements produced by professional bodies, which may contain arbitration agreements.[34] Some courts have accepted that, by referring to general terms and conditions in their contract, the parties have consented to the arbitration agreement therein because they should reasonably have

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[29] *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, Supreme Court, England and Wales, 3 November 2010, UKSC 2009/0165. See also the contrary decision by the French Paris Court of Appeal in the same matter: *Gouvernement du Pakistan — Ministère des affaires religieuses v. société Dallah Real Estate and Tourism Holding Company*, Court of Appeal of Paris, France, 17 February 2011, 09/28533, 09/28535 and 09/28541, 2011 REV. ARB. 286.

[30] Court of Appeal of the Canton of Basel-Landschaft, Switzerland, 5 July 1994, 30-94/261; *Bobbie Brooks Inc. v. Lanificio Walter Banci s.a.s.*, Court of Appeal of Firenze, Italy, 8 October 1977, IV Y.B. COM. ARB. 289 (1979), at 291.

[31] *Louis Dreyfus S.p.A. v. Cereal Mangimi S.r.l.*, Court of Cassation, Italy, 19 May 2009, 11529.

[32] *Del Medico & C. SAS v. Iberprotein Sl*, Court of Cassation, Italy, 16 June 2011, 13231.

[33] Bundesgerichtshof [BGH], Germany, 3 December 1992, III ZR 30/91.

[34] Domenico Di Pietro, *Validity of Arbitration Clauses Incorporated by Reference*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS — THE NEW YORK CONVENTION 1958 IN PRACTICE at 355 (E. Gaillard, D. Di Pietro eds., 2008).

known about the arbitration agreement.[35] Indeed, as noted by an Indian court, article II does not specify that the agreement to arbitrate must be contained in a single document.[36] Hence, in a case where the Convention applied, a United States court upheld an arbitration agreement contained in general terms and conditions on the grounds that the parties had tacitly consented to the general terms and conditions to which the contract referred, notwithstanding the fact that the plaintiff had never been in possession of those general terms and conditions. The court reasoned that failure to request the terms and conditions referred to in a contract implied tacit acceptance of its terms, including the arbitration agreement.[37] In the same vein, in *Bomar*, relying on both the Convention and French law, a French court held that an arbitration agreement contained in a document referred to in the main contract should be enforced insofar as it can be demonstrated that the parties were aware or should have been aware of it.[38] A number of courts have thus upheld arbitration agreements contained in general conditions referred to in the main contract.[39] In the same vein, in a dispute arising out of a bill of lading expressly referring to a charter party agreement, the Indian Supreme Court upheld an arbitration agreement contained in the charter party agreement.[40] As confirmation of this approach, article 7(6) (Option I) of the UNCITRAL Model Law on Arbitration expressly provides that a reference in a contract to any document containing an arbitration clause qualifies as an arbitration agreement in writing.[41]

22. *Fifth*, courts have relied on the procedural behaviour of the parties to infer their consent to arbitrate their disputes. Hence, participation in the arbitral proceedings without any objections to the jurisdiction of the arbitral tribunal has

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[35] *Owners & Parties Interested in the Vessel M.V. Baltic Confidence, et al. v. State Trading Corp. of India, et al. (India)*, Supreme Court, India, 20 August 2001, Special Leave Petition (civil) 17183 of 2001; *Tradax Export SA v. Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984; *X S.A. v. Y Ltd.*, Federal Tribunal, Switzerland, 12 January 1989, 5P.249/1988.

[36] *Gas Authority of India Ltd. v. SPIE-CAPAG SA and ors*, High Court of Delhi, India, 15 October 1993, Suit No. 1440; IA No. 5206.

[37] *Copape Produtos de Pétroleo LTDA. v. Glencore LTD.*, District Court, Southern District of New York, United States of America, 8 February 2012, 11 Civ. 5744 LAK.

[38] *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Appeal of Versailles, France, 23 January 1991, upheld by *Société Bomar Oil N.V. v. Entreprise tunisienne d'activités pétrolières (ETAP)*, Court of Cassation, France, 9 November 1993, 91-15.194. See also *SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG*, Court of Appeal of Basse Terre, France, 18 April 2005.

[39] *Del Medico & C. SAS v. Iberprotein Sl*, Court of Cassation, Italy, 16 June 2011, 13231; *Copape Produtos de Pétroleo LTDA. v. Glencore LTD.*, District Court, Southern District of New York, United States of America, 8 February 2012, 11 Civ. 5744 LAK; *Standard Bent Glass Corp. v. Glassrobots OY [Fin.]*, Court of Appeals, Third Circuit, United States of America, 20 June 2003, 02-2169; *SA Groupama transports v. Société MS Régine Hans und Klaus Heinrich KG*, Court of Cassation, France, 21 November 2006, 05-21.818; Court of Appeal of the Canton of Basel-Landschaft, Switzerland, 5 July 1994, 30-94/261; Oberlandesgericht [OLG] Cologne, Germany, 16 December 1992, XXI Y.B. COM. ARB. 535 (1996).

[40] *Owners & Parties Interested in the Vessel M.V. Baltic Confidence, et al. v. State Trading Corp. of India, et al. (India)*, Supreme Court, India, 20 August 2001, Special Leave Petition (civil) 17183 of 2001. See also: *Tradax Export SA v. Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984; *Welex A.G. v. Rosa Maritime Ltd.*, Court of Appeal, England and Wales, 3 July 2003, A3/02/2230 A3/02/2231.

[41] Article 7(6) (Option I) of the UNCITRAL Model Law on Arbitration (with amendments as adopted in 2006).

been held to establish the parties' agreement to arbitrate.[42] For instance, having found that an unsigned arbitration agreement did not comply with the requirements of article II(2), the Brazilian Superior Court of Justice nevertheless enforced an award rendered under that arbitration agreement on the grounds that the parties had consented to the arbitral tribunal's jurisdiction by participating in the arbitral proceedings without raising any objections to the arbitral tribunal's jurisdiction.[43] Likewise, an Australian court enforced an arbitral award on costs rendered under the auspices of the International Chamber of Commerce (ICC) in Paris where the arbitral tribunal found that it did not have jurisdiction as the arbitration agreement was invalid. The Australian court held that, by signing the Terms of Reference, the parties had consented to submit their dispute to arbitration.[44]

23. The reliance placed by courts on the parties' consent to arbitration is consistent with the Convention's philosophy of providing "satisfactory evidence of the agreement".[45] Commentators have emphasised the importance of the intention of the parties and whether there is a "meeting of minds".[46]

C. Scope of the "agreement in writing"

24. Article II(1) requires national courts to recognize an agreement in writing under which the parties have undertaken to submit to arbitration all "differences" in respect of a legal relationship which is capable of settlement by arbitration.

a. Meaning of "differences"

25. Article II(1) refers to the parties' undertaking to submit to arbitration "all or any differences" which have arisen or which may arise between them, and which are covered by their agreement.

26. Very few reported cases have addressed this issue and all of them have adopted a broad interpretation of "differences" in line with the pro-arbitration bias of the Convention.

27. In interpreting the word "differences", the High Court of Hong Kong has held that the parties should be referred to arbitration even when there is a dispute as to the existence of a dispute.[47] The court concluded that whether or not a dispute existed was a matter for the arbitral tribunal to determine. The Australian Supreme

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[42] *CTA Lind & Co. Scandinavia AB in Liquidation's bankruptcy Estate v. Erik Lind*, District Court, Middle District of Florida, Tampa Division, United States of America, 7 April 2009, 8:08-cv-1380-T-30TGW; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 13 July 1994, 1992 No. MP 2411; Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 SchH 05/99.

[43] *L'Aiglon S/A v. Têxtil União S/A*, Superior Court of Justice, Brazil, 18 May 2005, SEC 856.

[44] *Commonwealth Development Corp v. Montague*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No. 8159 of 1999; DC No. 29 of 1999.

[45] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Comments by the United Kingdom, E/2822/Add.4, Annex I, at 5.

[46] REINMAR WOLFF, THE NEW YORK CONVENTION, supra note 6, at 128-132; ICCA'S GUIDE, supra note 6, at 45.

[47] *Guangdong Agriculture Ltd. v. Conagra International Far East Company Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 24 September 1992, HCA003032/1992.

Court relied on the words "all or any" in article II(1) to confirm that article II(1) was to be construed broadly.[48] Similarly, the English Court of Appeal in *Fiona Trust* held that, in the absence of clear language to the contrary, arbitration clauses are to be given the broadest interpretation possible, since the parties, as rational businessmen, were likely to have intended any dispute arising out of the relationship into which they had entered to be decided by the same tribunal.[49]

b. "Defined legal relationship"

28. Article II(1)'s requirement that the dispute must have arisen "in respect of a defined legal relationship, whether contractual or not", is very broad and seldom disputed in case law.

29. Relying on the text of article II, the Canadian Supreme Court has held that extra-contractual claims could fall within the scope of an arbitration agreement when the claims relate to contractual obligations.[50]

c. "Subject matter capable of settlement by arbitration"

30. The requirement that the dispute concerns a "subject matter capable of settlement by arbitration" refers to the arbitrability of the dispute.[51] Given the New York Convention's lack of guidance on this topic, national courts have determined whether a specific subject matter can be settled by arbitration either by referring to the law applicable to the arbitration agreement or by referring to their own law.

31. Some courts have determined that this issue should be resolved according to the law applicable to the arbitration agreement. In making this determination, they have referred to the conflict of laws rule in article V(1)(a) of the Convention, i.e., "the law to which the parties have subjected [the arbitration agreement] or, failing any indication thereon, under the law of the country where the award was made."[52] By analogy, courts have interpreted the expression "where the award was made" to

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[48] *Seeley International Pty Ltd. v. Electra Air*, Federal Court, Australia, 29 January 2008, SAD 157 of 2007.

[49] *Fiona Trust & Holding Corp. v. Privalov*, Court of Appeal, England and Wales, 24 January 2007, 2006 2353 A3 QBCMF, upheld by *Fili Shipping Co. Ltd. and others v. Premium Nafta Products Ltd. and others*, House of Lords, England and Wales, 17 October 2007.

[50] *Kaverit Steel and Crane v. Kone Corp.*, Alberta Court of Queen's Bench, Canada, 14 May 1991, AJN° 450 and *Kaverit Steel v. Kone Corp.*, Court of Appeal of Alberta, Canada, 16 January 1992, ABCA 7.

[51] Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, Article II, supra note 15, at 96-73; Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS — THE NEW YORK CONVENTION 1958 IN PRACTICE 39, at 53 (E. Gaillard, D. Di Pietro eds., 2008); Jan Paulsson, *Arbitrability, Still Through a Glass Darkly*, in ARBITRATION IN THE NEXT DECADE — 1999 SPECIAL SUPPLEMENT 95, at 96 (ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN, 1999).

[52] *Misr Insurance Company v. Alexandria Shipping Agencies Company*, Court of Cassation, Egypt, 23 December 1991, 547/51 (unofficial translation).

mean "where the award shall be made", i.e. by reference to the seat of arbitration. Swiss and Austrian courts have followed this approach.[53]

32. Other courts have assessed whether a dispute was capable of settlement by arbitration pursuant to their own system of law. In so doing, courts have followed three different approaches to conclude that the lex fori should apply to determine whether a dispute is capable of settlement by arbitration.

33. *First*, a number of courts have relied on article V(2)(a) of the Convention which provides that whether the subject matter of a dispute is capable of settlement by arbitration is to be assessed pursuant to the law of the country where recognition and enforcement is sought. By analogy, the Italian Court of Cassation determined that the lex fori, that is, the law of the State of the court seized, should be applied to determine whether a dispute is capable of settlement by arbitration.[54] Belgian courts have followed the same approach.[55]

34. *Second*, in assessing whether a dispute is capable of settlement by arbitration and consequently deciding whether to refer the parties to arbitration pursuant to article II(3), courts in the United States have applied the Federal Arbitration Act, that is the lex fori, but without any reference to article V(2)(a).[56] Hence, United States courts have recognized that disputes arising out of a Statute are capable of settlement by arbitration under the Convention. By way of example, disputes arising out of the Shearman Act on antitrust,[57] the Securities Act and Exchange Act,[58] the Jones Act on employment,[59] and bankruptcy legislation[60] were held to be capable of settlement by arbitration. United States courts have also accepted that disputes

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[53] Federal Tribunal, Switzerland, 21 March 1995, 5C.215/1994/lit; Supreme Court, Austria, 17 November 1971, I Y.B. COM. ARB. 183 (1976).

[54] *Compagnia Generale Construzioni 'COGECO' S.p.A. v. Piersanti*, Court of Cassation, Italy, 27 April 1979, XVI Y.B. COM. ARB. 229 (1996).

[55] *Colvi N.V. v. Interdica*, Supreme Court, Belgium, 15 October 2004, C.02.0216.N.

[56] *Scherk v. Alberto-Culver Company*, Supreme Court, United States of America, 17 June 1974, 73-781; *Rhone Mediterranee Compagnia Francese v. Lauro*, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523.

[57] *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, Supreme Court, United States of America, 2 July 1985, 3-1569.

[58] *Scherk v. Alberto-Culver Company*, Supreme Court, United States of America, 17 June 1974, 73-781.

[59] *Lindo v. NCL, Ltd.*, Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367.

[60] *Société Nationale Algérienne Pour La Recherche, La Production and others v. Distrigas Corp.*, District Court, District of Massachusetts, United States of America, 17 March 1987, 86-2014-Y.

arising out of employment[61] and distributorship contracts[62] are capable of settlement by arbitration.[63]

35. *Third*, French courts have rejected the application of a particular national law to assess whether or not a dispute is capable of settlement by arbitration. Relying on article VII of the Convention, the Paris Court of Appeal held that French principles were applicable as being more favourable than article II. It further held that the principle of the validity of international arbitration agreements, which is a "substantive rule of French international arbitration law", establishes the validity of any arbitration clause "irrespective of any reference to national law".[64] The Paris Court of Appeal expressly distinguished this principle from articles II and V of the Convention "which call, in particular, for the application of national laws to render the clause valid."[65] By way of example, a French court referred the parties to arbitration on the basis of an arbitration agreement contained in an employment contract notwithstanding the petitioner's argument that employment disputes were not capable of settlement by arbitration. The court noted that the Convention applied since the employment contract was international and France had withdrawn its commercial reservation.[66]

ARTICLE II(2)

36. Article II(2) defines the "in writing" requirement. An "agreement in writing" includes[67] "an arbitral clause in a contract, or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

37. Prior to UNCITRAL addressing the issue, national courts had diverged on whether the more-favourable-rule principle embodied in article VII(1) of the Convention applied to the requirement that an arbitration agreement be "in writing" within the meaning of article II. In 2006, UNCITRAL confirmed that article VII(1) "should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to

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[61] *Lindo v. NCL, Ltd.*, Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10-10367; *Jane Doe v. Princess Cruise Lines, LTD., a foreign corporation, d.b.a. Princess Cruises*, Court of Appeals, Eleventh Circuit, United States of America, 23 September 2011, 10-10809.

[62] *Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH*, Court of Appeals, Third Circuit, United States of America, 17 July 1978, 77-2566, 77-2567; *Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited*, District Court, Southern District of New York, United States of America, 10 September 2012, 12 Civ. 3483(DLC).

[63] In so doing, courts have assessed whether, for each Statute, it was the congressional intent to have a specific category of disputes capable of settlement by arbitration: *Mitsubishi Motors Corp v. Soler Chrysler-Plymouth*, Supreme Court, United States of America, 2 July 1985, 437 U.S. 614. More generally, see GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 769 and 778.

[64] *Ste A.B.S. American Bureau of Shipping v. Copropriété Maritime Jules Verne et autres*, Court of Appeal of Paris, France, 4 December 2002, 2001/17293, upheld by *Copropriété Maritime Jules Verne et autres v. Société A.B.S. American bureau of shipping*, Court of Cassation, France, 7 June 2006, 03-12.034.

[65] *Ste A.B.S. American Bureau of Shipping v. Copropriété Maritime Jules Verne et autres*, Court of Appeal of Paris, France, 4 December 2002, 2001/17293.

[66] *SA C.F.T.E. v. Jacques Dechavanne*, Court of Appeal of Grenoble, France, 13 September 1993.

[67] On the bearing of the word "include", see infra [A/CN.9/814, Add.2], para. 53 and the footnote 91.

be relied upon, to seek recognition of the validity of such an arbitration agreement."[68] Since then, national courts have more consistently enforced arbitration agreements pursuant to the less stringent formal requirements available under their national laws or treaties as provided for by article VII with respect to arbitral awards.[69]

A. "Arbitral clause in a contract" versus "arbitration agreement"

38. The Convention provides that an "agreement in writing" may be either an "arbitral clause in a contract" or an "arbitration agreement".

39. Examples of "arbitral clauses in a contract" within the meaning of article II(2) have been found when the arbitration agreement is printed on the back of the contract.[70]

40. Regarding the "arbitration agreement", an Australian court has confirmed that the Terms of Reference signed in arbitration proceedings under the auspices of the International Court of Arbitration of the International Chamber of Commerce in France qualified as an "arbitration agreement" and an "agreement in writing" within the meaning of article II(2).[71] In that case, one of the respondents in the arbitral proceedings had successfully objected to the jurisdiction of the arbitral tribunal. The arbitral tribunal then issued an award on costs in favour of that respondent who then sought to enforce the award. The appellant opposed enforcement on the grounds that the arbitral tribunal had found that there was no valid arbitration agreement binding the respondent. The Supreme Court of Queensland enforced the award, finding that the Terms of Reference signed by the parties to the arbitration proceedings constituted an "agreement in writing" within the meaning of article II.

41. The distinction between an arbitral clause in a contract and an arbitration agreement, sometimes referred to as a "submission agreement",[72] has lost most of

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[68] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), *Official Records of the General Assembly*, Sixty-first Session, Supplement No. 17 (A/61/17), paras. 177-181 and Annex II, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. The *Travaux préparatoires* to the Recommendation are contained in *Official Records of the General Assembly*, Fifty-sixth Session, Supplement No. 17 (A/56/17), para. 313; Ibid., Fifty-seventh Session, Supplement No. 17 (A/57/17), para. 183; and in United Nations documents A/CN.9/468, paras. 88-106; A/CN.9/485, paras. 60-77; A/CN.9/487, paras. 42-63; A/CN.9/508, paras. 40-50; A/CN.9/592, paras. 82-88; A/CN.9/WG.II/WP.118, paras. 25-33; A/CN.9/607; and A/CN.9/609, and its addenda 1 to 6.

[69] For a more detailed analysis on the interaction between articles II and VII, see the commentary on article VII, paras. 31-35.

[70] See supra para. 19. See also: Bayerisches Oberstes Landesgericht [BayObLG], Germany, 17 September 1998, BayObLG 4 Z Sch 1/98; Bundesgerichtshof [BGH], Germany, 25 May 1970, VII ZR 157/68; Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 SchH 05/99; Bundesgerichtshof [BGH], Germany, 12 February 1976, III ZR 42/74.

[71] *Commonwealth Development Corp v. Montague*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No. 8159 of 1999; DC No. 29 of 1999.

[72] The expression "arbitration agreement" is sometimes used in a broader sense to include both arbitration clauses and submission agreements. See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1999), at 193-196.

its relevance in contemporary arbitral practice. In a 1994 decision, the United States Court of Appeals for the Fifth Circuit distinguished between an arbitral clause in a contract and an arbitration agreement. It ruled that, within the meaning of article II(2), while the former needed to be signed by the parties, no such requirement applied to the latter.[73] This position was subsequently rejected by the United States Court of Appeals for the Second Circuit. It held that the signature requirement in article II(2) of the Convention applies to both contracts containing an arbitral clause and arbitration agreements, unless they are contained in an exchange of letters or telegrams.[74]

B. The signature requirement

42. Pursuant to article II(2), the requirement of an agreement in writing is complied with when an arbitral clause or an arbitration agreement is signed by the parties.

43. When the parties to the contract or instrument containing the arbitration agreement have signed such contract or instrument, the signature requirement of article II(2) is to be regarded as satisfied. This has been generally followed by courts.[75]

44. Conversely, certain courts have refused to enforce arbitration agreements against parties that have not signed it.[76] For example, the Chinese Supreme Court denied enforcement of an award on the ground that only one party had signed the contract containing the arbitration clause.[77] Similarly, the Brazilian Superior Court

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[73] *Sphere Drake Insurance PLC v. Marine Towing*, Court of Appeals, Fifth Circuit, United States of America, 23 March 1994, 93-3200. See also: *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, District Court, South District of New York, United States of America, 7 August 1997, 96 CV 6587 (BDP).

[74] *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, Court of Appeals, Second Circuit, United States of America, 9 July 1999, 97-9436. See also: *Czarina, L.L.C. v. W.F. Poe Syndicate*, Court of Appeals, Eleventh Circuit, United States of America, 4 February 2004, 03-10518; *Moscow Dynamo v. Alexander M. Ovechkin*, District Court, District of Columbia, United States of America, 18 January 2006, 05-2245 (EGS).

[75] *Sunward Overseas SA v. Serviocios Maritimos Limitada Semar*, Supreme Court of Justice, Colombia, 20 November 1992, 472; *Krauss Maffei Verfahrenstechnik GmbH et al. v. Bristol Myers Squibb S.p.A.*, Court of Cassation, Italy, 10 March 2000, 58; *Steve Didmon v. Frontier Drilling (USA), INC., et al.*, District Court, Southern District of Texas, Houston Division, United States of America, 19 March 2012, H-11-2051; *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, Court of Appeals, Second Circuit, United States of America, 29 July 1999, 97-9436; *Smita Conductors Ltd. v. Euro Alloyw Ltd.*, Supreme Court, India, 31 August 2001, Civil Appeal No. 12930 of 1996; Bundesgerichtshof [BGH], Germany, 8 June 2010, XI ZR 349/08; Bundesgerichtshof [BGH], Germany, 25 January 2011, XI ZR 350/08.

[76] Court of Appeal of the Republic and Canton of Ticino, Second civil Chamber, Switzerland, 2 April 2003.

[77] *Concordia Trading B.V. v. Nantong Gangde Oil Co., Ltd.*, Supreme People's Court, China, 3 August 2009, [2009] MinSiTaZi No. 22.

of Justice refused to enforce an arbitration agreement because the parties had not signed the contract containing the arbitration agreement.[78]

45. In the same vein, in *Javor v. Francoeur*, the Canadian Supreme Court of British Columbia refused to enforce an award rendered against the respondent because it had not signed the arbitration agreement. During the arbitral proceedings, the tribunal found that the respondent was the alter-ego of the corporate party which had signed the arbitration agreement and consequently ordered the respondent to participate in the arbitral proceedings. The court relied on the text of article II(2) of the British Columbia Foreign Arbitral Awards Act (which mirrors article II(2) of the Convention) and ruled that the purpose of the Act was to limit enforcement of awards to "part[ies] signatory to the [arbitration] agreement." Since the respondent was not a named party or a signatory to the arbitration agreement, the award could not be enforced against it.[79]

46. By contrast, a number of courts have enforced arbitration agreements against parties that had not signed the arbitration agreement. For instance, United States courts have held that non-signatories can be bound by an arbitration agreement to the extent that the arbitration agreement is not null and void under the Convention and that a contract law theory — such as agency, estoppel, or principles relating to alter-egos and third party beneficiaries — applies to the case at hand.[80] In France, entities that had not signed the arbitration agreement have sometimes been referred to arbitration pursuant to the group of companies doctrine.[81]

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[78] *Plexus Cotton Limited v. Santana Têxtil S/A*, Superior Court of Justice, Brazil, 15 February 2006, SEC 967; *Indutech SpA v. Algocentro Armazéns Gerais Ltda.*, Superior Court of Justice, Brazil, 17 December 2008, SEC 978; *Kanematsu USA Inc. v. ATS — Advanced Telecommunications Systems do Brasil Ltda.*, Superior Court of Justice, Brazil, 18 April 2012, SEC 885.

[79] *Javor v. Francoeur*, Supreme Court of British Columbia, Canada, 6 March 2003. See also: *Dallah Real Estate and Tourism Holding Company v. Ministry of Religious Affairs, Government of Pakistan*, Supreme Court, England and Wales, 3 November 2010, UKSC 2009/0165.

[80] *Formostar, LLC, et al. v. Henry Florentius, et al.*, District Court, District of Nevada, United States of America, 13 July 2012, 2:11-cv-01166-GMN-CWH; *Flexi-Van Leasing, Inc. v. Through Transport Mutual Insurance Association, Ltd., et al.*, Court of Appeals, Third Circuit, United States of America, 18 August 2004, 03-3383; *Sarhank Group v. Oracle Corporation*, Court of Appeals, Second Circuit, United States of America, 14 April 2005; *Milton Escobal v. Celebration Cruise Operator Inc., Celebration Cruise Line LLC*, Court of Appeals, Eleventh Circuit, United States of America, 20 July 2012, 11-14022. See also, for a case where none of the contract law theories were found applicable: *Bel-Ray Co., Inc. (US) v. Chemrite (Pty) Ltd. (South Africa)*, Court of Appeals, Third Circuit, United States of America, 28 June 1999,
No. 98-6297; *Sarhank Group v. Oracle Corporation*, Court of Appeals, Second Circuit, United States of America, 14 April 2005, 02-9383.

[81] *Société Kis France et autres v. Société Générale et autres*, Court of Appeal of Paris, France, 31 October 1989, 1992 REV. ARB. 90.

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Note by the Secretariat

Addendum

[Article II(2)]

C. An arbitral clause or an arbitration agreement included in an exchange of documents

a. An exchange

47. Under article II(2), an agreement will also meet the "in-writing" requirement if it is contained in an exchange of letters or telegrams. As noted by a German court, the essential factor in the exchange of documents requirement under the New York Convention is mutuality; that is, reciprocal transmission of documents.[82]

48. The United States District Court for the District of Colombia has confirmed that one party's unilateral conduct is insufficient to establish an "agreement in writing" within the meaning of article II(2) of the Convention.[83] In that case, the counter-party never responded either explicitly or implicitly to the letters containing the arbitration agreements.

49. In the context of an investment arbitration dispute, the United States Court of Appeals for the Second Circuit has confirmed that the requirement of an exchange of documents within the meaning of article II of the Convention is fulfilled by an

[82] Oberlandesgericht [OLG] Frankfurt, Germany, 26 June 2006, 26 Sch 28/05; Bayerisches Oberstes Landesgericht [BayObLG], Germany, 12 December 2002, 4 Z Sch 16/02.

[83] *Moscow Dynamo v. Alexander M. Ovechkin*, District Court, District of Columbia, United States of America, 18 January 2006, 05-2245 (EGS).

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offer to arbitrate contained in a bilateral investment treaty and its subsequent acceptance by an investor in the Request for Arbitration.[84]

b. Non-exhaustive list of documents

50. Even though article II(2) only makes express reference to "an exchange of letters or telegrams", it is widely accepted that article II(2) covers any exchange of documents and is not limited to letters and telegrams. Most courts recognize that an arbitration agreement contained in an exchange of documents or other written communications, whether physical or electronic, satisfies the requirement of article II(2).[85]

51. By way of example, a Canadian court ruling upon the validity of an arbitration agreement under article V(1)(a) has confirmed that an "agreement in writing" under article II(2) can take various forms and should be given a functional and pragmatic interpretation.[86]

52. Indeed, at its thirty-ninth session, in July 2006, UNCITRAL expressly recommended that article II(2) be applied "recognizing that the circumstances described therein are not exhaustive".[87] As further confirmation, at the same session, UNCITRAL amended the Model Law on Arbitration to clarify that "the requirement that an arbitration agreement be in writing is met by an electronic communication (...)".[88] In accordance with the UNCITRAL Recommendation, a recent Spanish decision has held that the list of documents set out in article II is not

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[84] *Republic of Ecuador v. Chevron Corp. (US)*, Court of Appeals, Second Circuit, United States of America, 17 March 2011, 10–1020–cv (L), 10–1026 (Con). See also *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc.*, Court of Appeals, Ninth Circuit, United States of America, 23 October 1989, 88-5879/88-5881 for the Iran-US Claims Tribunal Statutes qualifying as an "agreement in writing".

[85] For an exchange of telexes and faxes, see: *Compagnie de Navigation et Transports SA v MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; *C S.A. v E. Corporation*, Court of Justice of Geneva, Switzerland, 14 April 1983, 187. For an exchange by e-mails with a confirmation by fax, see: *Great Offshore Ltd v Iranian Offshore Engineering & Construction Co*, Supreme Court, Civil Appellate Jurisdiction, India, 25 August 2008, Arbitration Petition No. 10 of 2006.

[86] *Sheldon Proctor v. Leon Schellenberg*, Court of Appeal of Manitoba, Canada, 11 December 2002.

[87] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (2006), para. 1. *Official Records of the General Assembly, Sixty-first Session, Supplement No. 17* (A/61/17), paras. 177-181 and Annex II, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf. As early as 2005, the United Nations Convention on the Use of Electronic Communications in International Contracts prepared by UNCITRAL provided that it applies, pursuant to its article 20, to the use of electronic communications in connection with the formation or performance of an agreement falling under the New York Convention. See the Resolution 60/21 adopted by the General Assembly on 23 November 2005 on the United Nations Convention on the Use of Electronic Communications in International Contracts, available at www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf.

[88] Article 7(4) (Option I) of the UNCITRAL Model Law on Arbitration (with amendments as adopted in 2006).

exhaustive and therefore an arbitration agreement concluded by electronic means of communications fulfils the "in-writing" requirement.[89]

53. Relying on the wording "include" in article II(2), certain commentators have also considered that the circumstances described in article II(2) are not exhaustive.[90]

c. Whether the signature requirement applies to an exchange of documents

54. Where the arbitration agreement is contained in an exchange of documents, the text of article II(2) does not, on its face, require the parties' signature on the agreement to arbitrate.

55. The Swiss Federal Tribunal has confirmed that when the arbitration agreement is contained in an exchange of documents, the signature requirement does not apply.[91] Similarly, ruling upon Section 7 of the Indian Arbitration Act of 1996 (which mirrors article II(2) of the Convention), the Supreme Court of India has upheld an arbitration agreement contained in an unsigned contract exchanged between parties.[92] This approach has been followed in many jurisdictions.[93]

56. By contrast, a limited number of decisions have refused to enforce an unsigned arbitration agreement that had been exchanged via telexes.[94]

57. The *travaux préparatoires* and the wording of article II(2) support the approach that the signature requirement does not apply to an exchange of documents. The drafters of the New York Convention were concerned to adopt a flexible "in-writing" requirement in order to reflect business reality.[95] For this

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[89] High Court of Justice of Cataluña, Spain, 15 March 2012, RJ 2012/6120.

[90] See, for example, Toby Landau, Salim Moollan, *Article II and the Requirement of the Form*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 189, at 244-247 (E. Gaillard, D. Di Pietro eds., 2008); Gabrielle Kaufmann-Kohler, *Arbitration Agreements in Online Business to Business Transactions*, in LIBER AMICORUM K.-H. BOCKSTIEGEL 355 (2001), at 358-362. In fairness, taken in isolation, this argument is not determinative as it is not supported by the Convention's other official languages. For instance, the French uses the expression "*On entend par "convention écrite" (...)*" which does not suggest a non-exhaustive list but rather a definition of the "agreement in writing".

[91] *Compagnie de Navigation et Transports SA v MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; *Tradax Export SA v Amoco Iran Oil Company*, Federal Tribunal, Switzerland, 7 February 1984.

[92] *M/S Unissi (India) Pvt Ltd v Post Graduate Institute of Medical Education and Research*, Supreme Court, India, 1 October 2008, Civil Appeal No. 6039 of 2008.

[93] *Not Indicated v. Not Indicated*, Supreme Court, Austria, 21 February 1978, X Y.B. COM. ARB. 418 (1985), at 418-419; *Standard Bent Glass Corp. v. Glassrobots OY*, Court of Appeals, Third Circuit, United States of America, 20 June 2003, 02-2169. See also, at the award enforcement stage: Landgericht [LG] Zweibrücken, Germany, 11 January 1978, 6.0 H 1/77; Oberlandesgericht [OLG] Schleswig, Germany, 30 March 2000, 16 SchH 05/99.

[94] See *e.g.*, *Oleaginosa Moreno Hermanos Sociedad Anonima Comercial Industrial Financeira Imobiliaria y Agropecuaria v. Moinho Paulista Ltd*, Superior Court of Justice, Brazil, 17 May 2006, SEC 866, upheld by *Oleaginosa Moreno Hermanos Sociedad Anónima Comercial Industrial Financeira Imobiliaria y Agropecuaria v Moinho Paulista Ltda.*, Superior Court of Justice, Brazil, 7 March 2007, Motion for Clarification on SEC 866.

[95] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Comments by Governments and Organizations on the Draft Convention on the Recognition and

reason, a distinction was drawn between "an arbitral clause [...] or an arbitration agreement, signed by the parties" "or" "contained in an exchange of letters or telegrams".

ARTICLE II(3)

58. Where there is an agreement in writing as defined under article II(1) and (2), article II(3) requires national courts to refer the parties to arbitration, if requested to do so by at least one party, unless the court finds that the agreement is null and void, inoperative or incapable of being performed.

A. General principles

a. Obligation to refer the parties to arbitration

59. Article II(3) provides that a "court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement in writing within the meaning of this article, shall [...] refer the parties to arbitration [...]."As noted by the Supreme Court of Canada, the object and purpose of article II(3) is to strengthen the obligation to enforce arbitration agreements.[96]

60. The *travaux préparatoires* are silent on the scope of the obligation of courts to refer parties to arbitration. The expression "refer the parties to arbitration" has its origin in the Geneva Protocol, which provides, in relevant part, that the "tribunals of the Contracting Parties [...] shall refer the parties on the application of either of them to the decision of the arbitrators."[97] The expression was proposed by the Swedish delegation at the New York Conference and adopted after further modification by the drafting committee.[98]

61. Courts interpret the word "shall" in article II(3) to indicate that referral to arbitration is mandatory and cannot be left to the courts' discretion.[99] In practice,

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Enforcement of Foreign Arbitral Awards, E/2822/Add. 4 (United Kingdom); *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Thirteenth Meeting, E/CONF.26/SR.13 (Representative of the Hague Conference on Private International Law); *Travaux préparatoires*, Report of the Committee on the Enforcement of International Arbitral Awards, E/AC.42/SR.7 (Sweden, India); *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Ninth Meeting E/CONF.26/SR.9 (Representative of Germany), at 3.

[96] *GreCon Dimter Inc. v. J.R. Normand Inc. and Scierie Thomas-Louis Tremblay Inc.*, Supreme Court, Canada, 22 July 2005, 30217.

[97] Geneva Protocol on Arbitration Clauses, Article 4.

[98] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Twenty-First Meeting, E/CONF.26/SR.21, at 17-23; *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Consideration on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, E/CONF.26/L.59.

[99] See, for instance, *Renusagar Power Co Ltd v General Electric Company and anor*, Supreme Court, India, 16 August 1984; *Shin-Etsu Chemical Co Ltd v Aksh Optifibre Ltd and anor*, Supreme Court, India, 12 August 2005; *Ishwar D. Jain v. Henri Courier de Mere*, Court of Appeals, Seventh Circuit, United States of America, 3 April 1995, 94-3314; *Aasma et al. v. American Steamship Owners Mutual Protection and Indemnity Association Inc. (USA)*, Court of Appeals, Sixth Circuit, United States of America, 29 August 1996, 94-3881, 94-3883; *InterGen N.V. (Netherlands) v. Grina (Switzerland)*, Court of Appeals, First Circuit, United States of America, 22 September 2003, 03-1056; *Ingosstrakh v. Aabis Rederi Sovfrakht*, City Court of

courts have fulfilled their obligation to refer the parties to arbitration in two different manners.

62. The first approach, endorsed by civil law jurisdictions, consists in declining jurisdiction in the presence of an arbitration agreement. For instance, in a number of decisions, French and Swiss courts have held that, pursuant to article II of the Convention, the presence of an arbitration agreement rendered national courts incompetent and have thus referred the parties to arbitration.[100]

63. The second approach, endorsed by most common law jurisdictions, consists in staying judicial proceedings, thereby giving effect to the courts' obligation to enforce arbitration agreements. By way of example, the Australian Federal Court, in interpreting Section 7(2) of the Australian International Arbitration Act in light of article II(3) of the Convention, has held that the expression "shall refer the parties to arbitration [...] should not be taken as to having the meaning of obliging the parties to arbitrate."[101] Rather, the court explained that courts should stay judicial proceedings, but cannot compel the parties to arbitrate if they do not wish to do so.

64. Both approaches are consistent with the obligation of the courts of Contracting Parties to the Convention to refer the parties to arbitration.

65. Courts in certain jurisdictions go as far as issuing anti-suit injunctions in favour of arbitration. In particular, the English Court of Appeal has held that such anti-suit injunctions designed to compel parties to comply with an arbitration agreement were not in violation of the New York Convention.[102]

b. Party request necessary

66. Pursuant to article II(3), the courts' obligation to refer the parties to arbitration is triggered by the "request of one of the parties".

67. Whether or not a court can refer the parties to arbitration ex officio is not expressly settled by article II(3). However, as arbitration, by definition, is premised on consent, the parties are always at liberty to waive their prior agreement to arbitrate. If neither party alleges the existence of an arbitration agreement, the court will not ex officio refer the parties to arbitration but rather will, as a result, uphold

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Moscow, Former USSR, 6 May 1968, I Y.B. COM. ARB. 206 (1976); *Louis Dreyfus Corporation of New York v. Oriana Soc. di Navigazione S.p.a*, Court of Cassation, Italy, 27 February 1970, 470, I Y.B. COM. ARB. 189 (1976); *Nile Cotton Ginning Company v. Cargill Limited*, Court of Appeal of Cairo, Egypt, 29 June 2003, 92-7876.

[100] *Société Sysmode S.A.R.L. et Société Sysmode France v Société Metra HOS et Société SEMA*, Court of Appeal of Paris, 8 December 1988; *Les Trefileries & Ateliers de Commercy v. Société Philipp Brothers France et Société Derby & Co Limited*, Court of Appeal of Nancy, 5 December 1980. See also: *Fondation M v Banque X*, Federal Tribunal, Switzerland, 29 April 1996.

[101] *Hi-Fert Pty Ltd v. Kuikiang Maritime Carriers Inc.*, Federal Court, Australia, 26 May 1998, NG 1100 & 1101 of 1997. See also: *Westco Airconditioning Ltd v Sui Chong Construction and Engineering Ltd*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, No. A12848.

[102] *Aggeliki Charis Compania Maritima SA v. Pagnan SpA*, Court of Appeal, England and Wales, 17 May 1994; *Midgulf International Ltd v. Groupe Chimiche Tunisien*, Court of Appeal, England and Wales, 10 February 2010, A3/2009/1664; A3/2009/1664(A); A3/2009/1664(B); A3/2009/1664(C).

its own jurisdiction.[103] In such situations, courts often consider that the parties have waived their right to arbitrate.

68. For instance, United States courts generally find that parties waive their right to arbitrate when they "substantially" participate in litigation, or when they seek to invalidate the arbitration agreement before the courts of another country.[104] In assessing whether the conduct of the parties amounted to a waiver of their right to arbitrate, a Brazilian court held that such waiver must be clearly established; i.e., all the parties had to act in a manner that unequivocally demonstrated their wish to waive the arbitration agreement.[105]

69. The *travaux préparatoires* reflect the fact that the drafters of the New York Convention contemplated the possibility that parties would fail to raise the existence of an arbitration agreement in proceedings before national courts. Indeed, the drafters specifically deleted the expression "of its own motion" from an earlier draft of article II(3) in order to leave greater freedom to the parties and to preserve the possibility for the parties to waive their right to have a particular dispute resolved through arbitration.[106]

c. *Matters in respect of which there is an agreement*

70. Article II(3) limits the obligation to refer the parties to arbitration to "matter[s] in respect of which" there is an agreement in writing, as defined in paragraphs (1) and (2) of article II.

71. The English Court of Appeal has indicated that, under both the English Arbitration Act of 1975 and the New York Convention, courts "are bound to send a dispute to arbitration if it is a dispute with regard to any matter to be referred."[107] To interpret the word "matter", the Australian Federal Court relied on the pro-arbitration policy of the Convention and held that the term was of "wide import" and was not limited, for the purposes of Section 7(2)(b) of the Australian Arbitration Act (which is similar to article II(3) of the Convention), to issues arising out of the parties' pleadings.[108]

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[103] See e.g., *British Telecommunications Plc v SAE Group Inc*, High Court of Justice, England and Wales, 18 February 2009, HT-08-336, [2009] EWHC 252 (TCC).

[104] *Anna Dockeray v. Carnival Corporation*, District Court, Southern District of Florida, Miami Division, United States of America, 11 May 2010, 10-20799; *Apple & Eve LLC v. Yantai North Andre Juice Co. Ltd*, District Court, Eastern District of New York, United States of America, 27 April 2009, 07-CV-745 (JFB)(WDW).

[105] *Companhia Nacional de Cimento Portland – CNCP v CP Cimento e Participações S/A*, Court of Justice of Rio de Janeiro, Brazil, 18 September 2007, Civil Appeal 24.798/2007. Compare with *L'Aiglon S/A v Têxtil União S/A*, Superior Court of Justice, Brazil, 18 May 2005, SEC 856 (supra [A/CN.9/814/Add.1] para. 22) where the Superior Court of Justice held that participation in arbitral proceedings amounts to consent to arbitration.

[106] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Records of the Twenty-fourth Meeting, E/CONF.26/SR.24.

[107] *Kammgarn Spinnerei GmbH v. Nova (Jersey) Knit Ltd*, Court of Appeal, England, 2 April 1976.

[108] *Casaceli v. Natuzzi S.p.A. (formerly known as Industrie Natuzzi S.p.A.)*, Federal Court, Australia, 29 June 2012, NSD 396 of 2012. See also: *CTA International Pty Ltd v. Sichuan Changhong Electric Co.*, Supreme Court of Victoria, Australia, 6 September 2002, 4278 of 2001.

72. In determining whether a dispute or a particular claim falls under the obligation to refer the parties to arbitration, national courts assess the scope of the agreement to arbitrate.[109] For instance, an Australian Court stayed proceedings pursuant to Section 7(2) of the Arbitration Act (implementing article II(3) of the New York Convention) by construing the broad language of the arbitration agreement which covered "all dispute arising in connection with this agreement or execution thereof (...)". The court concluded that claims related to the performance of the agreement were within the scope of the arbitration agreement.[110] Conversely, when parties have voluntarily excluded certain issues from the scope of their arbitration agreement, courts will refer them to arbitration to the extent that the dispute does not fall within the exclusion.[111]

73. Similarly, in determining whether or not to refer the dispute to arbitration under both the Federal Arbitration Act and the Convention, the United States Court of Appeals for the Eleventh Circuit assessed whether the dispute related to, arose from, or was connected with the employment agreements at stake. The court determined that claims of false imprisonment, intentional infliction of emotional distress, spoliation of evidence, invasion of privacy, and fraudulent misrepresentation were not dependent on the parties' employment relationship and therefore did not fall within the scope of the arbitration clause.[112]

d. Provisional and conservatory measures

74. The duty to refer the parties to arbitration does not extend to provisional and conservatory measures, except if the arbitration agreement itself refers to such measures. Most courts exercise jurisdiction to order interim or provisional relief in support of arbitration upon application by a party notwithstanding the presence of an arbitration agreement.[113]

75. For example, a French court has confirmed that the presence of an arbitration agreement does not prevent one of the parties from obtaining urgent provisional measures which do not require a ruling on the merits of the dispute.[114] The

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[109] *Nicola v. Ideal Image Development Corporation Inc.*, Federal Court, Australia, 16 October, NSD 1738 of 2008; *Commonwealth Development, Corp v. Montague*, Supreme Court of Queensland, Australia, 27 June 2000, Appeal No 8159 of 1999, DC No 29 of 1999.

[110] *CTA International Pty Ltd v. Sichuan Changhong Electric Co.*, Supreme Court of Victoria, Australia, 6 September 2002, 4278 of 2001.

[111] *Société Générale Assurance Méditerranéenne - G.A.M. v Société FSA-RE et S.A. Garantie Assistance*, Court of Appeal of Paris, France, 14 March 2008, 07/16773.

[112] *Jane Doe v. Princess Cruise Lines, LTD., a foreign corporation, d.b.a. Princess Cruises*, Court of Appeals, Eleventh Circuit, United States of America, 23 September 2011, 10-10809.

[113] *Hi-Fert Pty Ltd v. Kuikiang Maritime Carriers Inc.*, Federal Court, Australia, 26 May 1998, NG 1100 & 1101 of 1997; *Société Fieldworks-INC v Société Erim, S.A. Logic Instrument et Société ADD-on Computer Distribution (A.C.D.)*, Court of Appeal of Versailles, France, 4 July 1996, 3603/96, 3703/96, 3998/96; *Toyota Services Afrique (TSA) v Société Promotion de Représentation Automobiles (PREMOTO)*, Supreme Court, Côte d'Ivoire, OHADA, 4 December 1997, Arrêt n°317/97.

[114] *Société Fieldworks-INC v Société Erim, S.A. Logic Instrument et Société ADD-on Computer Distribution (A.C.D.)*, Court of Appeal of Versailles, France, 4 July 1996. The new 2011 French arbitration law limits the jurisdiction of the French courts' to order interim relief to the period prior to the constitution of the arbitral tribunal: see article 1449 of the French Code of civil procedure.

Australian Federal Court has similarly held that the existence of an otherwise applicable arbitration clause did not prevent a party from seeking injunctive or declaratory relief.[115]

76. Commentators have confirmed that national courts' jurisdiction to order provisional measures does not breach the New York Convention as it does not prejudice the merits of the dispute.[116]

B. Enforcement of arbitration agreements under article II(3)

77. Article II(3) requires national courts to refer the parties to arbitration unless they find that the relevant agreement is "null and void, inoperative or incapable of being performed."

78. Neither the *travaux préparatoires* nor the text of the Convention provides any indication as to the standard of review that should be applied by national courts in this exercise, nor is there any further elucidation of the terms "null and void, inoperative or incapable of being performed."

a. Standard of review

79. The New York Convention does not address the issue of the standard of review of arbitration agreements pursuant to article II(3).[117]

80. Two trends are discernible in the case law. Some courts perform a full review of the agreement to arbitrate to assess whether it is "null and void, inoperative or incapable of being performed", while others confine themselves to a limited or prima facie inquiry, which itself can take on various forms and distinctions.

81. As the Convention does not prohibit courts from conducting either a prima facie review of the arbitration agreement[118] or a full review of its existence and validity, none of the two approaches can be held to breach the New York Convention.

82. The full review standard has been endorsed by certain jurisdictions, notably Italy and Germany.

83. The Italian Court of Cassation held that article II(3) allows national courts to assess the validity and efficacy of the arbitration agreement, noting that it is an inherent part of the power of the domestic court to review the validity of the arbitration agreement.[119]

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[115] *Electra Air Conditioning BV v. Seeley International Pty Ltd*, Federal Court, Australia, 8 October 2008, SAD 16 of 2008.

[116] Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, *Article II, supra* [A/CN.9/814/Add.1] note 15, at 139-144.

[117] The same conclusion may be drawn from case law regarding article 8 of the UNCITRAL Model Law on Arbitration, see UNCITRAL, 2012 DIGEST OF CASE LAW ON THE MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, Article 16 (2012), at 75-76, para. 3, available at www.uncitral.org/pdf/english/clout/MAL-digest-2012-e.pdf.

[118] This view is mirrored under the UNCITRAL Model Law on Arbitration where article 8(1) in fine exactly reflects the text of article II(3) of the Convention: Frédéric Bachand, *Does Article 8 of the Model Law Call for Full or Prima Facie Review of the Arbitral Tribunal's Jurisdiction?*, 22 ARB. INT'L 463 (2006).

[119] *Heraeus Kulzer GmbH v. Dellatorre Vera SpA*, Court of Cassation, Italy, 5 January 2007, 35.

84. While not expressly referring to the Convention, German courts also conduct a full review of the arbitration agreement in assessing whether to refer the parties to arbitration. In so doing, courts rely on the German code of civil procedure that expressly provides that prior to the constitution of the arbitral tribunal, a party may apply to a court to establish the admissibility or inadmissibility of arbitration proceedings.[120] By way of example, relying on Section 1032 of the Code of civil procedure, the German Federal Supreme Court conducted a full review of the arbitration agreement contained in a standard form consumer contract. It held that, notwithstanding the principle of *Kompetenz-Kompetenz*, the lower court had erred in limiting its scrutiny of the arbitration agreement, as the court's competence may not be curtailed by agreement of the parties. Having confirmed that the arbitration agreement complied with the formal and substantive requirements of German law, the court referred the parties to arbitration.[121] German commentators confirm that German courts follow the same approach under the New York Convention.[122]

85. Other jurisdictions have restricted their review of the arbitration agreement to a limited analysis to confirm prima facie that it is not "null and void, inoperative or incapable of being performed".[123]

86. For instance, in France, courts apply a prima facie standard of review of the arbitration agreement. National courts are thus precluded from performing an in-depth analysis of the arbitration agreement and must refer the parties to arbitration unless the arbitration agreement is manifestly null and void.[124]

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[120] See Section 1032 of the Code of Civil Procedure (ZPO), available at: www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p3471.

[121] Bundesgerichtshof [BGH], Germany, 13 January 2005, III ZR 265/03.

[122] Dorothee Schramm, Elliott Geisinger, Philippe Pinsolle, *Article II*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 37, at 99-100 (H. Kronke, P. Nacimiento, D. Otto, N.C. Port eds., 2010); Peter Huber, *Arbitration Agreement and Substantive Claim Before Court*, in ARBITRATION IN GERMANY: THE MODEL LAW IN PRACTICE 139, at 143-144, para. 15 (K.-H. Böckstiegel, S. Kröll and P. Nacimiento eds., 2007).

[123] For an argument in favour of a prima facie standard, see R. Doak Bishop, Wade M. Coriell, Marcelo Medina, *The 'Null and Void' Provision of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 275, at 280-286 (E. Gaillard, D. Di Pietro eds., 2008); Yas Banifatemi, Emmanuel Gaillard, *Negative Effect of Competence-Competence – The Rule of Priority in Favour of the Arbitrators*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 257 (E. Gaillard, D. Di Pietro eds., 2008); FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1996), at 407-408. *Contra*, see Jean-François Poudret, Gabriel Cottier, *Remarques sur l'application de l'article II de la Convention de New York (Arrêt du Tribunal Fédéral du 16 janvier 1995)*, 13 ASA BULL. 383 (1995), at 388-389.

[124] *Legal Department du Ministère de la Justice de la République d'Irak v Société Fincantieri Cantieri Navali Italiani, Société Finmeccanica et Société Armamenti E Aerospazio*, Court of Appeal of Paris, France, 15 June 2006; *SA Groupama transports v Société MS Régine Hans und Klaus Heinrich KG*, Court of Cassation France, 21 November 2006, 05-21.818; *Ste A.B.S. American Bureau of Shipping v Copropriété Maritime Jules Verne et autres*, Court of Appeal of Paris, France, 4 December 2002; *Société Generali France Assurances et al. v Société Universal Legend et al.*, Court of Cassation, France, 11 July 2006, 05-18.681. The new 2011 French arbitration law confirmed that even prima facie review by courts of an arbitration agreement is

87. Similarly, in India, the Supreme Court has relied on the spirit and the pro-enforcement bias of the New York Convention in order to determine the standard of review of arbitration agreements. In *Sin-Etsu*, the Supreme Court held that, although nothing in the language of article II(3) itself "indicated whether a finding as to the nature of the arbitral agreement has to be ex facie or prima facie, requiring only a prima facie showing better served the purpose of the New York Convention, which was to enable expeditious arbitration without avoidable intervention by judicial authorities".[125] The court emphasised that a prima facie review of the arbitration agreement at the pre-award stage would allow an expedited arbitral process while ensuring a fair opportunity to contest the award after full trial.

88. In Venezuela, the Supreme Court of Justice relied on the competence-competence principle and article II(3) of the Convention to conclude that it could not conduct a full analysis of the arbitration agreement, but should instead limit itself to a prima facie analysis of whether the arbitration agreement was "null and void, inoperative or incapable of being performed." The Supreme Court of Justice further held that, in applying the prima facie standard, Venezuelan courts should limit themselves to an assessment of whether there is an arbitration agreement in writing and should not enter into an analysis of whether a party had consented to arbitrate.[126]

89. The prima facie standard has also been embraced in the Philippines by adopting the Special Rules of Court on Alternative Dispute Resolution ("Special ADR Rules") which constitute guidelines by the Supreme Court binding on lower courts. Rule 2.4 of the Special ADR Rules explicitly provides for a prima facie test in order to determine whether the arbitration agreement is "null and void, inoperative or incapable of being performed".[127]

90. In a number of jurisdictions, courts have adopted a prima facie standard of review, but have confined its scope to certain situations or issues.

91. For instance, Swiss courts apply a prima facie standard of review to the extent that the arbitration agreement provides for Switzerland as the seat of arbitration.[128] Under such a scenario, the Swiss Federal Tribunal held that the court's review was

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time-barred after the arbitral tribunal is seized (see article 1448 of the French Code of civil procedure).

[125] *Shin-Etsu Chemical Co. Ltd (Japan) v Aksh Optifibre Ltd. & Anr. (Ind)*, Supreme Court, India, 12 August 2005, Appeal (civil) 5048 of 2005; Emmanuel Gaillard, Yas Banifatemi, *Prima Facie Review of Existence, Validity of Arbitration Agreement*, N.Y.L.J. (December 2005), at 3. See also *JS Ocean Liner LLC v MV Golden Progress, Abhoul Marine LLC*, High Court of Bombay, India, 25 January 2007.

[126] *Astivenca Astilleros de Venezuela, C.A. v. Oceanlink Offshore A.S.*, Supreme Court of Justice, Venezuela, 10 November 2011, Exp. No. 09-0573, XXXVI Y.B. COM. ARB. 496 (2011).

[127] Rule 2.4 of the Special ADR Rules. See ARBITRATION IN THE PHILIPPINES UNDER THE ALTERNATIVE DISPUTE RESOLUTION ACT OF 2004 R.A. 9285 155 (E. Lizares ed., 2011), at 200-212, paras. 11.01-11.02.

[128] On the issue whether this solution should be extended to all arbitration agreements, see in favour: Emmanuel Gaillard, *La reconnaissance, en droit suisse, de la seconde moitié du principe d'effet négatif de la compétence-compétence*, in GLOBAL REFLECTIONS ON INTERNATIONAL LAW, COMMERCE AND DISPUTE RESOLUTION – LIBER AMICORUM IN HONOUR OF ROBERT BRINER 311 (G. Aksen et al eds., 2005). *Contra*: Jean-François Poudret, Gabriel Cottier, *Remarques sur l'application de l'Article II de la Convention de New York*, 13 ASA BULL. 383 (1995).

limited to a prima facie verification of the existence and validity of the arbitration clause.[129] On the other hand, where the arbitration agreement provides for a seat outside Switzerland, the Swiss Federal Tribunal has held that it was entitled to conduct a full review of the existence and validity of the arbitration agreement.[130]

92. In Canada, courts have adopted a prima facie standard of review of the arbitration agreement, but have limited its scope to questions of facts. As a result, Canadian courts are entitled to conduct a full review of the arbitration agreement to the extent that the challenge to the arbitrators' jurisdiction pertains to "question[s] of law". This principle was established by the Supreme Court of Canada in *Dell*. Having set out the two schools of thought on the standard of review, the court held that article II(3) of the Convention did not provide that a court is required to rule on whether the arbitration agreement is null and void, inoperative or incapable of being performed before the arbitrators do. The court continued and held that, as a general rule, "any challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator" in accordance with the competence-competence principle.[131] While the Canadian Supreme Court has clearly adopted a prima facie standard of review as a general rule, it then limited the arbitrators' power to rule on their jurisdiction to the sole facts of the case, thus upholding the courts' competence to rule on the arbitrators' jurisdiction in relation to questions of law and to assessing whether the challenge to the arbitrators' jurisdiction constituted a dilatory tactic.

93. In England, courts have endorsed the principle that arbitrators should be the first tribunal to rule on their jurisdiction, but have limited this principle in a number of ways. In the seminal *Fiona Trust* decision,[132] the English Court of Appeal established that "it will, in general, be right for the arbitrators to be the first tribunal to consider whether they have jurisdiction to determine the dispute." However, the court further held that courts maintain within their jurisdiction the right to determine whether an arbitration agreement had come into existence at all. Relying on *Fiona Trust*, the High Court of Justice in *Albon* explained that, despite the fact that the arbitral tribunal had jurisdiction to determine whether the arbitration agreement was ever concluded in accordance with the principle of *Kompetenz-Kompetenz*, such principle "does not preclude the court itself from determining that question."[133] It held that, prior to staying judicial proceedings and referring the parties to arbitration under Section 9(1) of the 1996 Arbitration Act,[134] it should be satisfied that (i) there

[129] *Fondation M v Banque X, Federal Tribunal*, Switzerland, 29 April 1996.

[130] *Compagnie de Navigation et Transports SA v MSC Mediterranean Shipping Company SA*, Federal Tribunal, Switzerland, 16 January 1995; Federal Tribunal, Switzerland, 25 October 2010, 4 A 279 / 2010.

[131] *Dell Computer Corporation v. Union des consommateurs and Olivier Dumoulin*, Supreme Court, Canada, 13 July 2007.

[132] *Fiona Trust & Holding Corp. v. Privalov*, Court of Appeal, England and Wales, 24 January 2007, 2006 2353 A3 QBCMF, upheld by *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others*, House of Lords, England and Wales, 17 October 2007.

[133] *Albon (t/a NA Carriage Co) v. Naza Motor Trading Sdn Bhd*, High Court of Justice, England and Wales, 29 March 2007, HC05C02150, [2007] EWHC 665 (Ch).

[134] Section 9(1) of the English 1996 Arbitration Act gives effect to article II. It provides: "A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter."

existed a valid arbitration agreement and (ii) the dispute fell within its scope. In reviewing this two-step process in *Berezovsky*, the Court of Appeal held that a stay would be granted when the applicant had proven, on the balance of probabilities, that the arbitration agreement existed and apparently covered the matters in dispute.[135]

94. In practice, once a court is satisfied that an arbitration agreement exists and that the dispute falls within its terms pursuant to Section 9(1) of the 1996 Arbitration Act, it will grant a stay pursuant to Section 9(4) of the 1996 Arbitration Act (giving effect to article II(3) of the Convention) unless it finds that the arbitration agreement is null and void, inoperative or incapable of being performed.[136] As ruled by the High Court of Justice in *A v. B.*, courts should conduct a cost analysis to determine whether the issue of whether the arbitration agreement is "null and void, inoperative or incapable of being performed" should be dealt with by the arbitral tribunal or by the courts.[137] The court held that it will "depend heavily on the extent to which the resolution of that issue will involve findings of fact which impact on substantive rights and obligations of the parties which are already in issue and whether in general the trial can be confined to a relatively circumscribed area of investigation or is likely to extend widely over the substantive matters in dispute between the parties. If the latter is the case the appropriate tribunal to resolve the jurisdictional issues is more likely to be the arbitration tribunal, provided it has *Kompetenz-Kompetenz*." This approach has been followed consistently.[138]

95. In the United States of America, courts have approached the standard of review issue in terms of whether the court or the arbitral tribunal has "primary power" to determine the validity of an arbitration agreement. The leading case in this regard, although it does not cite the New York Convention, was rendered by the Supreme Court in *First Options*.[139]

96. In *First Options*, the Supreme Court held that there is a presumption in favour of courts deciding whether the arbitral tribunal has jurisdiction, unless the parties have agreed explicitly to submit this issue to the arbitral tribunal in their arbitration agreement. However, once the court is satisfied that a valid arbitration agreement exists, and that it complies with the requirements of both the Federal Arbitration Act

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[135] *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, Court of Appeal, England and Wales, 2 July 2013, [2013] EWCA Civ 784.

[136] *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240; *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, Court of Appeal, England and Wales, 2 July 2013, [2013] EWCA Civ 784.

[137] *A v. B.*, High Court of Justice, England and Wales, 28 July 2006, 2005 FOLIO 683, [2006] EWHC 2006 (Comm).

[138] *Joint Stock Company 'Aeroflot-Russian Airlines' v. Berezovsky & Ors*, Court of Appeal, England and Wales, 2 July 2013, [2013] EWCA Civ 784; *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

[139] *First Options of Chicago Inc. v. Kaplan*, Supreme Court, United States of America, 22 May 1995, 514 U.S. 938 (1995). See also William Park, *The Arbitrability Dicta in First Options v. Kaplan: What Sort of Kompetenz-Kompetenz Has Crossed the Atlantic?*, 12 ARB. INT'L 137 (1996), reprinted 11 INT'L ARB. REP. 28 (1996).

and the Convention, the Supreme Court held that the presumption reverses in favour of the arbitral tribunal.[140]

97. United States courts have found that parties agreed to empower the arbitrators to determine the existence and validity of the arbitration agreement when the arbitration rules explicitly allowed the arbitrators to do so. For instance, the Court of Appeals for the Second Circuit held that a reference to the UNCITRAL Arbitration Rules constituted "clear and unmistakable evidence of the parties' intent" to have arbitrators decide on their jurisdiction.[141] Such "clear and unmistakable evidence" has also been inferred from arbitration agreements stating that "any and all" disputes are to be resolved by arbitration.[142]

98. In the absence of clear and unmistakable evidence of the parties' intention, the Supreme Court in *Prima Paint* held that, if a claim goes to the "making" of the arbitration agreement, courts have jurisdiction.[143] Subsequent decisions applying the New York Convention have followed the same reasoning.[144] In so doing, courts have determined that both challenges to the existence of the contract containing the arbitration agreement and to the validity of the arbitration agreement go to the "making" of the arbitration agreement, and thus should be adjudicated by the courts.[145] For instance, in *Sphere Drake*, the Court of Appeals of the Second Circuit held that if "a party alleges that a contract is void and provide some evidence in support, then the party need not specifically allege that the arbitration clause in that contract is void and the party is entitled to trial [this issue before the court]."[146] Similarly, in *Nanosolutions*, the District Court of Columbia, relying on the decision of the Supreme Court in *Buckeye*, held that "challenges [specific to] the validity of the agreement to arbitrate may be adjudicated by this Court."[147] However, when

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[140] *First Options of Chicago Inc. v. Kaplan*, Supreme Court, United States of America, 22 May 1995, 514 U.S. 938 (1995).

[141] *Republic of Ecuador v. Chevron Corp. (US)*, Court of Appeals, Second Circuit, United States of America, 17 March 2011, 10-1020-cv (L), 10-1026 (Con). For a similar reasoning regarding the AAA Arbitration Rules, see also: *JSC Surgutneftegaz v. President and fellows of Harvard College*, District Court, Southern District of New York, United States of America, 3 August 2005, 04 Civ. 6069 (RCC).

[142] *Oriental Republic of Uruguay, et al. v. Chemical Overseas Holdings, Inc., Chemical Overseas Holdings, Inc. and others v. Republica Oriental del Uruguay, et al.*, District Court, Southern District of New York, United States of America, 24 January 2006, XXXI Y.B. COM. ARB. 1406 (2006).

[143] *Prima Paint Corporation v. Flood & Conklin MFG*, Supreme Court, United States of America, 12 June 1967, 388 U.S. 395 (87 S.Ct. 1801, 18 L.Ed.2d 1270).

[144] See, e.g., *Phoenix Bulk Carriers Ltd. V. Oldendorff Carriers GmbH & Co., KG*, District Court, Southern District of New York, United States of America, 6 November 2002, XXVIII Y.B. COM. ARB. 1088 (2003), at 1091.

[145] *The Canada Life Assurance Company v. The Guardian Life Insurance Company of America*, District Court, Southern District of New York, United States of America, 22 January 2003; *Guang Dong Light Headgear Factory v. ACI International, Inc.*, District Court, District of Kansas, United States of America, 10 May 2005, 03-4165-JAR; *Dedon GMBH and Dedon Inc. v. Janus et CIE*, Court of Appeals, Second Circuit, United States of America, 6 January 2011, 10-4331.

[146] *Sphere Drake Insurance Limited v. Clarendon America Insurance Company*, Court of Appeals, Second Circuit, United States of America, 28 August 2001, 00-9464, XXVII Y.B. COM. ARB. 700 (2002), at 707.

[147] *Nanosolutions, LLC et al. v. Rudy Prajza, et al.*, District Court, District of Columbia, United States of America, 2 June 2011, 10-1741.

assessing the validity of the arbitration agreement, courts have performed a "very limited inquiry" in line with the "strong federal policy favouring arbitration" stemming from the Federal Arbitration Act implementing the New York Convention.[148]

99. On the other hand, when United States courts face a challenge which goes to the validity of the contract as a whole, they have referred the parties to arbitration pursuant to both the New York Convention and the Federal Arbitration Act.[149]

b. Courts' review of the existence and validity of an "agreement in writing"

100. Article II(3) requires national courts to refer the parties to arbitration "unless [they find] that the said agreement is null and void, inoperative or incapable of being performed."

101. United States courts have held that the grounds for refusing to refer parties to arbitration listed under article II(3) are exhaustive.[150] Similarly, an Indian court has held that there are only three grounds under article II(3) for refusing enforcement of an arbitration agreement: (i) the agreement is null and void; (ii) the agreement is inoperative; and (iii) the agreement is incapable for being performed.[151]

102. On the other hand, the United States Court of Appeals for the Second Circuit determined that it had jurisdiction to establish whether an arbitration agreement existed before referring the dispute to the arbitrators.[152] In so ruling, the Court did not refer to any exceptions provided for under article II(3).

i. "Null and void"

103. Article II(3) of the Convention is silent with regards to the legal standard for determining whether an arbitration agreement is null and void. Some courts consider that the issue is to be determined pursuant to the applicable municipal law, either the

[148] *Bautista v. Star Cruises and Norwegian Cruise Line, Ltd.*, District Court, Southern District of Florida, United States of America, 14 October 2003, 03-21642-CIV. See also *Agnelo Cardoso v. Carnival Corporation*, District Court, Southern District of Florida, United States of America, 15 March 2010, 09-23442-CIV-GOLD/MCALILEY; *Boston Telecommunications Group, Inc. et al. v. Deloitte Touche Tohmatsu, et al.*, District Court, Northern District of California, United States of America, 7 August 2003, C 02-5971 JSW.

[149] *Prima Paint Corporation v. Flood & Conklin MFG*, Supreme Court, United States of America, 12 June 1967, 388 U.S. 395 (87 S.Ct. 1801, 18 L.Ed.2d 1270); *Sphere Drake Insurance Limited v. Clarendon America Insurance Company*, Court of Appeals, Second Circuit, United States of America, 28 August 2001, 00-9464, XXVII Y.B. COM. ARB. 700 (2002); *Nanosolutions, LLC et al. v. Rudy Prajza, et al.*, District Court, District of Columbia, United States of America, 2 June 2011, 10-1741; *Ascension Orthopedics, Inc. v. Curasan AG*, District Court, Western District of Texas, Austin Division, United States of America, 20 September 2006, A-06-CA-424 LY.

[150] *Lindo (Nicaragua) v. NCL (Bahamas), Ltd. (Bahamas)*, Court of Appeals, Eleventh Circuit, United States of America, 29 August 2011, 10 10367; *Aggarao (Philippines) v. MOL Ship Management Company Ltd. (Japan), Nissan Motor Car Carrier Company, Ltd., trading as Nissan Carrier Fleet (Japan), World Car Careers (Lebanon)*, Court of Appeals, Fourth Circuit, United States of America, 16 March 2012, 10-2211.

[151] *Gas Authority of India Ltd v SPIE-CAPAG SA and ors*, High Court of Delhi, India, 15 October 1993, Suit No. 1440, IA No. 5206. See also, in Canada: *Automatic Systems Inc. v. Bracknell Corporation* Court of Appeal of Ontario, Canada, 17 February 1994.

[152] *Dedon GMBH and Dedon Inc. v. Janus et CIE*, Court of Appeals, Second Circuit, United States of America, 6 January 2011, 10-4331.

lex fori[153] or the applicable law pursuant to the conflict-of-laws rule contained in article V(1)(a) of the Convention.[154]

104. United States courts, followed by English courts, have defined the expression "null and void" to mean "devoid of legal effect".[155] In practice, they have applied an international standard of contract law defences. In accordance with longstanding jurisprudence, United States courts have ruled upon the "null and void" ground pursuant to "standard breach-of-contract defences that can be applied neutrally on an international scale, such as fraud, mistake, duress, and waiver."[156] In applying such international standards, United States courts have adopted a narrow interpretation in light of "a general policy of enforceability of agreements to arbitrate".[157] For instance, courts have dismissed the argument that the arbitration agreement was void and unenforceable as contrary to public policy of the United States, reasoning that this defence "could not be applied neutrally on an international scale and, moreover, does not outweigh the policy favouring arbitration."[158]

105. In addition, parties have sought to invalidate arbitration agreements and escape their obligation to arbitrate by arguing that the main contract containing the agreement was null and void. The vast majority of courts distinguish between the invalidity of the contract and the invalidity of the arbitration agreement in accordance with the principle of the separability of the arbitration agreement — sometimes referred to as the principle of autonomy.

106. In *Fiona Trust*, the English Court of Appeal stayed the judicial proceedings before it pursuant to Section 9(1) of the 1996 Arbitration Act (giving effect to

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[153] Piero Bernardini, *Arbitration Clauses: Achieving Effectiveness in the Law Applicable to the Arbitration Clause*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, 1998 ICCA CONGRESS SERIES 197 (Albert Jan van den Berg ed., 1998).

[154] Federal Supreme Court, Switzerland, 21 March 1995, 5C.215/1994/lit.

[155] *Rhone Mediterranee Compagnia Francese v. Lauro*, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523. See also: *Albon (t/a NA Carriage Co) v. Naza Motor Trading Sdn Bhd*, High Court of Justice, England and Wales, 29 March 2007, HC05C02150, [2007] EWHC 665 (Ch); *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

[156] *St. Hugh Williams v. NCL (Bahamas) LTD., d.b.a. NCL.*, Court of Appeals, Eleventh Circuit, United States of America, 9 July 2012, 11-12150; *Allen v. Royal Caribbean Cruise, Ltd.*, District Court, Southern District of Florida, United States of America, 29 September 2008, 08-22014.

[157] *Rhone Mediterranee Compagnia Francese v. Lauro*, Court of Appeals, Third Circuit, United States of America, 6 July 1983, 82-3523; *Anna Dockeray v. Carnival Corporation*, District Court, Southern District of Florida, Miami Division, United States of America, 11 May 2010, 10-20799; *Oriental Commercial and Shipping (UK) v. Rosseel, N.V. (Belgium)*, District Court, Southern District of New York, United States of America, 4 March 1985, 84 Civ. 7173 (PKL).

[158] *Allen v. Royal Caribbean Cruise, Ltd.*, District Court, Southern District of Florida, United States of America, 29 September 2008, 08-22014. See also: *Aggarao (Philippines) v. MOL Ship Management Company Ltd. (Japan), Nissan Motor Car Carrier Company, Ltd., trading as Nissan Carrier Fleet (Japan), World Car Careers (Lebanon)*, Court of Appeals, Fourth Circuit, United States of America, 16 March 2012, 10-2211; *Ledee (Puerto Rico) v. Ceramiche Ragno (Italy)*, Court of Appeals. First Circuit, United States of America, 4 August 1982, 684 F.2d 184, 82-1057. Concerning the unconscionability defence, see: *Rizalyn Bautista, et al. v. Star Cruises, et al.*, Court of Appeals, Eleventh Circuit, United States of America, 15 July 2005, 03-15884.

article II(1) of the New York Convention) as the applicant alleged the invalidity of the overall contract, but did not challenge the validity of the arbitration agreement itself.[159] Relying heavily on the severability principle, the Court of Appeal held that a contest regarding the invalidity of the overall contract, but not specifically directed at the arbitration agreement, will be addressed by the arbitrators. In the same manner, a Dutch court held that "the validity of the arbitration agreement is ascertained separately, independent of the validity of the main contract in respect of which arbitration has been agreed, even if both are contained in the same document."[160] The Madras High Court similarly made express reference to the "doctrine of separability", and referred the parties to arbitration on the basis that "[t]he plaintiffs cannot ignore the Arbitration Clause and invoke the jurisdiction of a Civil Court, just on the basis that even according to the defendants the underlying agreement was void."[161]

107. The separability doctrine has been endorsed by most countries,[162] arbitral institutions,[163] the UNCITRAL Model Law on Arbitration,[164] and leading commentators who consider that an arbitration agreement constitutes an agreement within an agreement.[165]

ii. "Inoperative"

108. Courts generally assess the standard of "inoperability" under the broader expression "null and void, inoperative or incapable of being performed" without any further distinction. However, the relevant jurisprudence suggests that the word "inoperative" covers situations where the arbitration agreement has become inapplicable to the parties or their dispute.[166]

109. For instance, in circumstances where the parties had waived their right to arbitrate by initiating judicial proceedings, an Indian court has held that the

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[159] *Fiona Trust & Holding Corp. v. Privalov*, Court of Appeal, England and Wales, 24 January 2007, 2006 2353 A3 QBCMF, upheld by *Fili Shipping Co Ltd and others v Premium Nafta Products Ltd and others*, House of Lords, England and Wales, 17 October 2007.

[160] *Claimant v. Ocean International Marketing B.V., et al*, Court of First Instance of Rotterdam, Netherlands, 29 July 2009, 194816/HA ZA 03-925.

[161] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce*, High Court of Madras, India, 29 October 2008. See also: Oberlandesgericht [OLG] Celle, Germany, 8 Sch 3/01, 2 October 2001.

[162] See e.g., Swiss Private International Law, Chapter 12, article 178(3), Colombian Arbitration Act, article 5; French arbitration law, article 1447; English Arbitration Act, article 7; Australian Arbitration Act, Chapter VI, article 16; Brazilian Arbitration Act, article 8; Chinese Arbitration Act, article 19.

[163] UNCITRAL Arbitration Rules, article 23(1); ICC Arbitration Rules, article 6(4); LCIA Arbitration Rules, article 23(1).

[164] Article 16(1) of the UNCITRAL Model Law on Arbitration provides that "an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause." A list of countries that have enacted legislation based on the UNCITRAL Model Law on Arbitration is available on the Internet at www.uncitral.org.

[165] R. Doak Bishop, Wade M. Coriell, Marcelo Medina, *The 'Null and Void' Provision of the New York Convention*, supra note 1234, at 278.

[166] See e.g., *Golden Ocean Group Ltd v. Humpuss Intermoda Transportasi TBK Ltd & anr*, High Court of Justice, England and Wales, 16 May 2013, [2013] EWHC 1240.

arbitration agreement was inoperative under Section 45 of the Indian Arbitration Act of 1996 mirroring article II(3) of the Convention.[167] Accordingly, it refused to refer to arbitration the parties which had submitted numerous civil and criminal suits before Indian courts.

110. A French court has found that it had jurisdiction as the timeframe specified for the constitution of the arbitral tribunal had expired, thereby dismissing the argument that there was no manifest inapplicability of the arbitration agreement pursuant to article II of the Convention. The court ruled that the arbitration agreement was "*caduc*" and concluded that it had jurisdiction over the dispute without any reference to the Convention.[168]

111. Another situation of the alleged inoperability of an arbitration agreement can be found in the *Westco* decision rendered by the High Court of Hong Kong. A party alleged that non-compliance with procedural conditions prior to the commencement of the arbitral proceedings rendered the agreement to arbitrate inoperative. The High Court dismissed the argument and referred the parties to arbitration.[169]

iii. "Incapable of being performed"

112. The "incapable of being performed" provision is generally understood as relating to situations where the arbitration cannot effectively be set in motion.[170] As explained by an Indian court relying on Section 45 of the Indian Arbitration Act of 1996 (which mirrors article II(3) of the Convention) "the phrase incapable of being performed signifies, in effect, frustration and the consequent discharge. If, after the making of the contract, the promise becomes incapable of being fulfilled or performed, due to unforeseen contingencies, the contract is frustrated."[171]

113. It emerges from case law that an arbitration agreement has been held incapable of being performed when the arbitration agreement was pathological, i.e., in two main situations: (i) when the arbitration agreement is unclear and does not provide sufficient indication to allow the arbitration to proceed and (ii) when the arbitration agreement designates an inexistent arbitral institution.

114. For instance, ruling upon Section 44 of the Indian Arbitration Act of 1996 (implementing articles I and II of the Convention), an Indian court denied enforcement of an arbitral clause providing for "Durban Arbitration and English

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[167] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce*, High Court of Madras, India, 29 October 2008. See also the citations at para. 67.

[168] *Société Gefu Kuchenboss GmbH & CO.KG et Société Gefu Geschafts-Und Verwaltungs GmbH v Société Coréma*, Court of Appeal of Toulouse, France, 9 April 2008.

[169] *Westco Airconditioning Ltd v Sui Chong Construction & Engineering Co Ltd*, Court of First Instance, High Court of the Hong Kong Special Administrative Region, Hong Kong, 3 February 1998, A12848.

[170] Stefan Kröll, *The 'Incapable of Being Performed' Exception in Article II(3) of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION 1958 IN PRACTICE 323, at 326 (E. Gaillard, D. Di Pietro eds., 2008).

[171] *Ramasamy Athappan and Nandakumar Athappan v Secretariat of Court, International Chamber of Commerce*, High Court of Madras, India, 29 October 2008. See also the references cited in para. 67.

Law to apply".[172] The court held that the alleged arbitration agreement was "absolutely vague, ambiguous and self-contradictory". Similarly, the Swiss Federal Tribunal refused to enforce an arbitral clause providing for arbitration "through the American Arbitration Association or to any other American court" on the ground that the arbitration agreement was not sufficiently clear so as to exclude beyond doubt the jurisdiction of the state courts under both article II(3) and Swiss law.[173]

115. In a case where the arbitration agreement designated a non-existent arbitral institution, a United States court nevertheless compelled the parties to arbitration pursuant to article II(3) of the Convention and the Federal Arbitration Act. The court reasoned that the UNCITRAL Arbitration Rules referred to in the arbitration agreement provided for a method for constituting an arbitral tribunal in the absence of a prior agreement by the parties and dismissed the plaintiff's claims that the agreement was incapable of being performed.[174]

116. In Russia, the Highest Arbitrazh Court of the Russian Federation held that, in order for the arbitration agreement to be enforceable under the Convention, the agreement had to contain clear language from which the true intentions of the parties to refer the dispute to an arbitration body could be ascertained.[175] Another Russian court held an arbitration agreement to be "incapable of being performed" within the meaning of article II(3) of the Convention because it was not a standard arbitration clause pursuant to the UNCITRAL Rules and it was therefore impossible to conclude that the parties had agreed on those Rules.[176] It further added that the appointing authority, the "President of the International Chamber of Commerce", did not exist.

117. Other courts have adopted a pro-arbitration stance and interpreted vague or inconsistent arbitration agreements so as to uphold such agreements. For instance, French courts have enforced an arbitral award rendered under the auspices of the Arbitration Court of the Chamber of Commerce of Yugoslavia notwithstanding that the wording of the arbitration agreement provided for arbitration under the auspices of a non-existent institution, the "Belgrade Chamber of Commerce". The court held that the parties intended to refer to the Arbitration Court of the Chamber of Commerce of Yugoslavia, which has its headquarters in Belgrade.[177] Similar reasoning has been adopted in Switzerland,[178] Germany,[179] and

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[172] *Swiss Singapore Overseas Enterprises Pvt Ltd v M/V African Trader*, High Court of Gujarat, India, 7 February 2005, Civil Application No. 23 of 2005.

[173] Federal Tribunal, Switzerland, 25 October 2010, 4A279/2010. It is unclear from that case whether the Federal Tribunal analysed the arbitration agreement under the "incapable of being performed" ground as the decision concluded that the arbitration agreement was invalid under the "null and void, inoperative or incapable of being performed" provision.

[174] *Travelport Global Distribution Systems B.V. v. Bellview Airlines Limited*, District Court, Southern District of New York, United States of America, 10 September 2012, 12 Civ. 3483(DLC).

[175] *Tula Ammunition Factory (Russia) v Sporting Supplies International (USA)*, Highest Arbitrazh Court, Russia, 27 July 2011, VAS-7301/11.

[176] *ZAO UralEnergoGaz (Russia) v OOO ABB Electroengineering (Russia)*, Ninth Arbitrazh Court of Appeal, Russia, 24 June 2009, No. A40-27854/09-61-247.

[177] *Epoux Convert v. Société Droga*, Court of Appeal of Paris, France, 14 December 1983, 1994 REV. ARB. 483.

[178] Federal Tribunal, Switzerland, 8 July 2003, 129 III 675.

[179] Kammergericht [KT] Berlin, 15 October 1999, XXVI Y.B. COM. ARB. 328 (2001).

Hong Kong[180] where the courts have held that the intention of the parties to have their dispute resolved by arbitration should prevail.

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[180] *Lucky Goldstar International Limited v. Ng Moo Kee Engineering Limited*, High Court, Supreme Court of Hong Kong, Hong Kong, 5 May 1993, XX Y.B. COM. ARB. 280 (1995).

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Note by the Secretariat

Addendum

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

TRAVAUX PRÉPARATOIRES ON ARTICLE VI

The *travaux préparatoires* on article VI as adopted in 1958 are contained in the following documents:

1. Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/L.34; E/CONF.26/L.16; E/CONF.26/L.44.

2. Summary Records of the 11th, 12th, 13th, 14th and 17th meetings of the United Nations Conference on International Commercial Arbitration.

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INTRODUCTION

1. Article VI of the Convention addresses the situation where a party seeks to set aside an award in the country where it was issued, while the other party seeks to enforce it elsewhere.

2. In this context of parallel proceedings, article VI achieves a compromise between the two equally legitimate concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of Contracting States the freedom to decide whether or not to adjourn enforcement proceedings.[1]

3. Article VI was not included in the early drafts of the Convention and the issues it addresses were first considered during the Conference. In turning their minds to these issues, the drafters of the Convention sought to ensure that a party wishing to frustrate the enforcement of an award could not circumvent the Convention by simply initiating proceedings to set aside or suspend the award, while at the same time limiting the risk that an enforced award would be subsequently set aside in the country in which it was made.

4. As explained by Mr. de Sydow, Chairman of Working Party No. 3 that drafted article VI: "[T]he Working Party recommended the adoption of that article in order to permit the enforcement authority to adjourn its decision if it was satisfied that an application for annulment of the award or for its suspension was made for a good reason in the country where the award was given. At the same time, to prevent an abuse of that provision by the losing party which may have started annulment proceedings without a valid reason purely to delay or frustrate the enforcement of the award, the enforcement authority should in such a case have the right either to enforce the award forthwith or to adjourn its enforcement only on the condition that the party opposing enforcement deposits a suitable security."[2]

5. Article VI may be regarded as an important step forward compared to the 1927 Geneva Convention on the execution of foreign arbitral awards under which a foreign court was required to refuse enforcement upon the mere application to set aside the award in the country where it was issued.[3] By contrast, article VI merely

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[1] See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1996), at 981; Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 416 (H. Kronke, P. Nacimiento et al. eds., 2010). See also *Continental Transfer Technique Ltd v. Federal Government of Nigeria*, High Court of Justice, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm); *IPCO v. Nigeria* (NNPC), High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[2] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 4.

[3] See article 1 of the 1927 Geneva Convention: "To obtain such recognition or enforcement, it shall, further, be necessary: [...] (*d*) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending; [...]." See also PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965), at 535; ALBERT JAN VAN DEN BERG, THE NEW YORK

allows national courts to adjourn their decision on enforcement should they "consider it proper".[4] The same principle is provided for, in substance, in article 36(2) of the UNCITRAL Model Law on Arbitration.[5]

6. Although article VI is often raised alongside article V(1)(e), which provides that a court may refuse to recognize and enforce an award if it "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country",[6] it covers a different situation. By adjourning the enforcement proceedings, courts seek to preserve the status quo in order to enable the application to set aside or suspend the award to be made in the country where it was issued.[7] In this sense, article VI may be regarded as "a corollary" to article V(1)(e) and as closing a "temporal gap" that exists when an action to set aside the award is pending before a competent authority.[8]

7. It took a while for practitioners to avail themselves of the possibilities offered by article VI.[9] Now, courts around the world have applied this provision with a view to promoting the objectives of the Convention by facilitating the recognition and enforcement of arbitral awards and avoiding inconsistent decisions.[10]

ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 353.

[4] The District Court of Columbia has provided the following definition of "adjourn" within the meaning of article VI of the Convention: "stay or dismiss without prejudice". See *Telcordia Technologies, Inc. v. Telkom SA, Limited*, District Court, District of Columbia, United States of America, 9 April 2004, 02-1990. See also *CPConstruction Pioneers Baugesellschaft Anstalt v. The Government of the Republic Ghana, Ministry of Roads and Transport*, District Court, District of Columbia, United States of America, 12 August 2008, 1:04-01564 (LFO); *Continental Transfert Technique Lmt. v. Federal Government of Nigeria et al.*, District Court, District of Columbia, United States of America, 23 March 2010, 08-2026 (PLF).

[5] Article 36(2) of the UNCITRAL Model Law on Arbitration provides that: "If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

[6] For a more detailed analysis, see the commentary on article V(1)(e) of the New York Convention.

[7] *ESCO Corp v. Bradken Resources Pty Ltd*, Federal Court, Australia, 9 August 2011, NSD 876 of 2011.

[8] Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 439 (R. Wolff ed., 2012); Michael H. Strub, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031 (1989-1990), at 1047.

[9] See Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L L. 269 (1979), at 273.

[10] See, for example, *Telcordia Technologies, Inc. v. Telkom SA, Limited*, District Court, District of Columbia, United States of America, 9 April 2004, 02-1990.

ANALYSIS

A. General principles

a. The requirement that an application for the setting aside or suspension of an award be pending

8. Article VI of the Convention requires that an application for the setting aside or suspension of an award "has been made" before a competent authority. In the absence of such an application, courts must refuse to adjourn the decision on the enforcement of the award.

9. Several courts have considered whether to adjourn enforcement proceedings pursuant to article VI in cases where it was not established that the pending application constituted an attempt to set aside or suspend the award. For example, the United States District Court for the Western District of Washington held that a damages claim in a second set of arbitral proceedings did not amount to an action to set aside or suspend the award within the meaning of article VI.[11] In another case, the United States Court of Appeals for the Third Circuit dismissed a request for adjournment on the grounds that an action, initiated before the same arbitral tribunal, to remedy a harm that occurred after a first award was issued did not amount to an action to set aside or suspend the award.[12] In a further case, the Supreme Court of New South Wales refused to grant an adjournment in a situation where the defendant had failed to establish that the application made before a competent authority in Sweden related to the setting aside or suspension of the award.[13]

10. Courts also require the party opposing enforcement to demonstrate that an application to set aside or suspend an award is still pending. If the application has already been dismissed, courts will refuse to adjourn the decision on the enforcement of an award.[14] By way of example, a French court denied adjournment on the ground that even though the party seeking adjournment had initiated proceedings to suspend the enforcement of the award in Italy, those proceedings had been dismissed by the Rome Court of Appeal.[15]

b. The application for the setting aside or suspension of an award must be made to a "competent authority"

11. Article VI of the Convention provides that courts may adjourn the enforcement decision if the application to set aside or suspend the award has been made in front

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[11] *Korea Wheel Corporation v. JCA Corporation*, District Court, Western District of Washington at Seattle, United States of America, 16 December 2005, C05-1590C.

[12] *Stephen and Mary Birch Foundation, Inc. v. Admart AG, Heller Werkstatt GesmbH and others*, Court of Appeals, Third Circuit, United States of America, 8 August 2006, 04-4014.

[13] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[14] *S.A. Recam Sonofadex v. S.N.C. Cantieri Rizzardi de Gianfranco Rizzardi*, Court of Appeal of Orléans, France, 5 October 2000; Debt Collection and Bankruptcy Chamber of the Court of Appeal of the Republic and Canton of Ticino, Switzerland, 9 December 2010, 14.2010.98.

[15] *S.A. Recam Sonofadex v. S.N.C. Cantieri Rizzardi de Gianfranco Rizzardi*, Court of Appeal of Orléans, France, 5 October 2000.

of a "competent authority." To determine whether this prerequisite has been satisfied, courts refer to the standards found in article V(1)(e) of the Convention.[16]

12. As pointed out in the commentary to article V(1)(e), the country under the laws of which the award is made is often the same as the country in which the award is issued and thus, in practice, courts have mainly referred to the country in which the arbitration took place.[17]

13. If the court is not satisfied that an application has been made before a "competent authority", within the meaning of articles V(1)(e) and VI, the request to adjourn proceedings will be denied. For example, the Luxembourg Court of Appeal dismissed a request for adjournment noting that there was no setting aside procedure pending in Belgium, the "court of the country of rendition".[18] Similarly, the Court of First Instance of Rotterdam refused an adjournment request based on a setting aside application pending in the Belgian courts on the ground that Israeli courts had exclusive jurisdiction to hear a setting aside application of an award issued in Israel.[19] The United States Court of Appeals for the District of Columbia held that where an arbitration occurred in London under the arbitration laws of England, the courts of England were the "competent authority with primary jurisdiction over the Final Award" and that, absent proceedings for the setting aside or suspension of the award in those courts, adjournment should be denied.[20] In that case, the court recalled that enforcement may be adjourned "only if [...] an application for the setting aside or suspension of the award has been made to a competent authority."[21]

14. In line with the principle that the party opposing enforcement of an arbitral award has the burden of proving that one or more of the defences under the Convention apply,[22] the burden of proving that the authority to which the application was made is competent to hear the application lies with the party seeking the adjournment. On that basis, the Supreme Court of New South Wales in *Hallen v. Angledal* refused to adjourn its decision on enforcement as it did not

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[16] See, for example, *Four Seasons Hotels and Resorts, B.V., et al. v. Consorcio Barr, S.A.*, District Court, Southern District of Florida, Miami Division, United States of America, 4 June 2003, 02-23249; *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167; *The Commercial Company for Investment v. Bell Rover Shipping Limited*, Court of Appeal of Cairo, Egypt, 19 March 1997, 68/113.

[17] For a detailed analysis of the case law, see the commentary on article V(1)(e) of the New York Convention.

[18] *Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment and Isny*, Superior Court of Justice, Luxembourg, 24 November 1993. See also *The Commercial Company for Investment v. Bell Rover Shipping Limited*, Court of Appeal of Cairo, Egypt, 19 March 1997.

[19] *Isaac Glecer v. Moses Israel Glecer and, Estera Glecer-Nottman*, President of the District Court of Rotterdam, Netherlands, 24 November 1994, XXI Y.B. COM. ARB. 635 (1996).

[20] *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167.

[21] *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167.

[22] See, for example, *Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc.*, Court of Appeals, Second Circuit, United States of America, 31 March 2005, 403 F.3d 85. See also *Thai-Lao Lignite Co. Ltd. et al. v. Government of the Lao People's Democratic Republic*, District Court, Southern District of New York, United States of America, 3 August 2011, 10 Civ. 5256 (KMW); *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

"consider that the defendants have established that the necessary application has been made to competent authority in Sweden."[23]

c. Whether the party must request an adjournment and/or an order for security

15. Pursuant to article VI of the Convention, the authority before which the award is sought to be relied upon may order that the party opposing enforcement give suitable security "on the application of the party claiming enforcement". The language of article VI allows the courts to order security only if the party seeking enforcement so requests.

16. In *Spier*, the United States District Court for the Southern District of New York first noted that it should not order security since "neither party [...] had briefed the question of security", but still requested the defendant to show cause as to the reasons why security in the full amount should not be required, even though neither party had addressed the issue.[24] Since then, courts in the United States have consistently held that security should be ordered "on the application of the plaintiff".[25] In a recent case, the United States District Court for the Western District of Michigan recognized its power to order security under article VI, but refused to make such an order as the party opposing enforcement had failed to make the appropriate motion.[26]

17. It is thus accepted that article VI requires that the party seeking enforcement must "affirmatively" apply for security.[27]

18. Article VI does not however contain a similar requirement for courts adjourning proceedings. Courts may adjourn enforcement proceedings without any of the parties having applied for such an adjournment. For example, the English Court of Appeal held that, even though neither party had requested an adjournment, "a court might conclude of its own motion that the determination of an application under s. 103(5) [which directly incorporates and whose wording is equivalent to article VI] would be an inappropriate use of court time and/or contrary to comity or likely to give rise to conflict of laws problem."[28] In the United States, courts have

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[23] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999. See also *Four Seasons Hotels and Resorts, B.V., et al. v. Consorcio Barr, S.A.*, District Court, Southern District of Florida, Miami Division, United States of America, 4 June 2003, 02-23249.

[24] *Spier v. Calzaturificio Tecnica S.p.A ("Spier I")*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871.

[25] *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998); *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[26] *Leonard Higgins v. SPX Corporation*, District Court, Western District of Michigan, United States of America, 18 April 2006, 2006 WL 1008677.

[27] Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 434 (H. Kronke, P. Nacimiento et al. eds., 2010).

[28] *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

held that they have "inherent power to control [their] docket", irrespective of article VI of the Convention, and to stay the enforcement proceedings.[29]

19. Leading commentators have also noted that courts could, pursuant to article VI, decide *sua sponte* to adjourn enforcement proceedings.[30]

d. The discretionary power of the courts to adjourn the decision on enforcement or order security

20. Under article VI of the Convention, a court of a Contracting State "may, if it considers it proper, adjourn" proceedings and "may also [...] order the other party to give suitable security". In light of the "permissive language" of article VI,[31] courts have full discretion to adjourn enforcement proceedings or order the defendant to provide security. As noted by the Supreme Court of Hong Kong, use of the term "may" indicates that the application for adjournment is a matter of discretion.[32]

21. The fact that courts were granted full discretion in that respect has been widely recognized throughout the world. The President of the First Instance Court of Paris acknowledged, in *Saint-Gobain*, that article VI of the Convention gives discretion to the enforcing judge to decide whether enforcement proceedings should be adjourned when an application to set aside or suspend an award has been made to a competent authority in the country where the award was issued. Similar rulings have been rendered in many countries, including Canada, Italy, Germany, Sweden and the United States of America.[33] Australian courts have found that section 8(8) of the International Arbitration Act 1974 (which implements article VI of the Convention) gives them "wide discretion" or a "general discretion" to adjourn enforcement proceedings if they are satisfied that an application for the setting aside or

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[29] *Oriental Republic of Uruguay, et al. v. Chemical Overseas Holdings, Inc. et al.*, District Court, Southern District of New York, United States of America, 24 January 2006, 05 Civ. 6154 (WHP); *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167; *Korea Wheel Corporation v. JCA Corporation*, District Court, Western District of Washington at Seattle, United States of America, 16 December 2005, C05-1590C.

[30] See e.g. Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 440 (R. Wolff ed., 2012); Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 79.

[31] See *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

[32] *Hebei Import & Export Corp v. Polytek Engineering Co Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725.

[33] *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096; *Nuovo Pignone SpA v. Schlumberger SA.*, Court of Appeal of Florence, Italy, 17 May 2005, XXXII Y.B. COM. ARB. 403 (2007); Oberlandesgericht [OLG] Schleswig, Germany, 16 June 2008, 16 Sch 02/07; *AB Götaverken v. General National Maritime Transport Company (GMTC), Libya and others*, Supreme Court, Sweden, 13 August 1979, VI Y.B. COM. ARB. 237 (1981); *Korea Wheel Corporation v. JCA Corporation*, District Court, Western District of Washington at Seattle, United States of America, 16 December 2005, C05-1590C; *China National Chartering Corp. et al. v. Pactrans Air & Sea Inc.*, District Court, Southern District of New York, United States of America, 13 November 2009, 06 Civ. 13107 (LAK); *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 28 March 2011, 10-0003 (PLF).

suspension of an award had been brought before a competent authority of the country in which, or under the law of which, the award was rendered.[34] Similarly, English courts consider that they have "wide" discretion[35] under article VI and are "unfettered when considering the exercise of [their] discretion".[36]

22. The courts' discretionary power applies not only to the decision to adjourn enforcement proceedings but also to whether a defendant should provide security and the amount of that security.[37]

23. Leading commentators agree that, on the basis of the permissive language used in article VI and the *travaux préparatoires*,[38] the decision to stay enforcement proceedings and/or order security is discretionary.[39]

B. The decision to grant or deny adjournment

a. The absence of a standard

24. The Convention does not provide any standard by which a court should decide whether to stay enforcement proceedings, thereby leaving courts in Contracting States to use their discretion.[40]

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[34] *ESCO Corp v. Bradken Resources Pty Ltd.*, Federal Court, Australia, 9 August 2011, [2011] FCA 905; *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[35] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm). See also *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd.*, High Court of Justice, England and Wales, 27 July 2011, [2011] EWHC 1957 (Comm).

[36] *Continental Transfer Technique Ltd v. Federal Government of Nigeria*, High Court of Justice, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm). In the United States, article VI has also been construed as granting "unfettered discretion" to adjourn pending the outcome of an application to set aside: see *Ukrvneshprom State Foreign Economic Enterprise v. Tradeway, Inc.*, District Court, Southern District of New York, United States of America, 11 March 1996, 95 Civ. 10279, XXII Y.B. COM. ARB. 958 (1997).

[37] *Spier v. Calzaturificio Tecnica S.p A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000); *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543; *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm); *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Island, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[38] See above at para. 4. See also a proposal of the Dutch delegate to the Conference, providing that the "judge in the country of enforcement must be given complete latitude either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made." *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Eleventh Meeting, E/CONF.26/SR.11, at 5.

[39] See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2873-2874; W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 211; Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 438 (R. Wolff ed., 2012); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 353 and 358.

25. In the 1981 *Fertilizer Corporation of India* case, the United States District Court for the Southern District of Ohio noted that it had been unable to discover any standard on which to base an adjournment decision, other than to ascertain whether an application for the setting aside or suspension of the award had been brought before a competent authority of the country in which, or under the law of which, the award was made.[41] Similarly, the English High Court of Justice held that the 1996 Arbitration Act did not furnish a threshold test in respect of the exercise of the court's wide discretion pursuant to section 103(5) (which implements article VI of the Convention).[42]

26. It is widely recognized that discretion should be "rationally" exercised.[43] As stated by the United States Court of Appeals for the Second Circuit, "where a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside, a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings."[44]

27. In the absence of a recognized standard, certain jurisdictions had in the past adjourned enforcement proceedings on the sole basis that setting aside proceedings were pending before the competent authority, as defined in articles V(1)(e) and VI of the Convention. For example, in *Norsolor*, the Paris Court of Appeal suspended enforcement proceedings pending the outcome of an application to set aside the award before the Vienna Court of Appeal on the ground that, if the award were to be set aside in Vienna, the enforcement proceedings would be stripped of their object.[45] In the United States, the District Court for the Southern District of New York also adjourned enforcement proceedings in Spier by deference to the ruling of the competent authority.[46]

28. However, the Convention does not provide that enforcement proceedings are to be automatically stayed when a setting aside application is brought.[47] As

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[40] W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 220; Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 419 (H. Kronke, P. Nacimiento et al. eds., 2010).

[41] *Fertilizer Corp. of India (India) v. IDI Mgmt. Inc. (US)*, District Court, Southern District of Ohio, United States of America, 9 June 1981, C-1-79-570.

[42] *IPCO v. Nigerian National Petroleum Corp.*, High Court of Justice, England and Wales, 17 April 2008, [2008] EWHC 797 (Comm).

[43] *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd.*, High Court of Justice, England and Wales, 27 July 2011, [2011] EWHC 1957 (Comm); Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 79.

[44] *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

[45] *Norsolor S. A. v Pabulk Ticaret Limited Sirket*, Court of Appeal of Paris, France, 15 December 1981. See also *C.C.M. SULZER v. Société Maghrébienne de Génie Civil (SOMAGEC), Société des Anciens Etablissements Riad Sahyoun (S.A.E.R.S.) et M. Riad Sahyoun*, Court of Appeal of Paris, France, 17 February 1987, 86.4767.

[46] *Spier v. Calzaturificio Tecnica S.p.A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871.

[47] Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 77; W. Michael

suggested by the *travaux préparatoires*, in appropriate circumstances, an award may be enforced despite a pending application to set it aside.[48]

29. In accordance with the discretionary power granted to courts of Contracting States under article VI, courts maintain the discretion to enforce an arbitral award even if setting aside proceedings are pending in the country where the award was issued. For example, courts in the United States have more recently held that they are not required to stay an action "merely because an action is pending in the originating country"[49] and that they "should not automatically stay enforcement proceedings on the ground that parallel proceedings are pending in the originating country".[50] Similarly, the Supreme Court of New South Wales has held that Australian courts should not stay an action to enforce an arbitration agreement merely because an action to set aside the award is pending before the competent authority.[51] In the words of the Supreme Court of New South Wales, "more must be established than that".[52]

30. Similarly, in recent years, French courts have repeatedly refused to adjourn enforcement proceedings under article VI of the Convention. In the 2004 *Bargues* case, the Paris Court of Appeal held that the potential setting aside of the award in the country where it is rendered does not impact the existence of the award in a way that would prevent its recognition and enforcement in other national legal orders and, as a result, that article VI "is of no use in the context of the recognition and enforcement of an award".[53]

b. Various factors considered by courts

31. Courts have been developing their own reasons in exercising their discretion and have considered a wide variety of factors when deciding whether to grant a request for adjournment. Those factors include the Convention's goal of facilitating the enforcement of arbitral awards and expediting dispute resolution, the likelihood of the party prevailing in the setting aside proceeding, the expected duration of the proceedings pending in the country where the award was issued, the potential hardship to parties, judicial efficiency and international comity.

32. Swedish and Australian courts have taken the view that the duration of annulment proceedings, as well as their chances of success, should be taken into account by a court deciding whether to adjourn enforcement proceedings under

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Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987) at 221.

[48] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 4.

[49] *Sarhank Group v. Oracle Corporation*, District Court, Southern District of New York, United States of America, 9 October 2002, XXVIII Y.B. COM. ARB. 1043 (2003).

[50] *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, District Court, Southern District of New York, United States of America, 14 May 2003, XXVIII Y.B. COM. ARB. 1271 (2003). See also *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[51] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[52] Id.

[53] *Société Bargues Agro Industries SA v Société Young Pecan Company*, Court of Appeal of Paris, France, 10 June 2004, 2003/09894.

article VI. German and Dutch courts have assessed the chances of success of annulment proceedings and weighed the interests of the parties when considering whether an adjournment is appropriate. A similar approach was followed by the Grand Court of the Cayman Islands in *Republic of Gabon v. Swiss Oil Corporation*. In this case, the Grand Court considered the duration and the probability of success of the annulment proceedings pending before the Paris Court of Appeal. In light of the expected short duration of the French proceedings and the fact that the "serious grounds" advanced by the applicant suggested that the application was not "merely a delaying tactic", the Grand Court decided to adjourn the enforcement proceedings. It held that that adjournment would not cause "any very substantial further hardship on the plaintiff [i.e. the Republic of Gabon]" and that "if this court were to render its decision before that of the Paris Court in this instance it would run the risk of giving free rein to enforcement of an award which in a few days' time might no longer provide a valid basis for its action."[54] Similarly, the English High Court in *IPCO* found the following considerations to be relevant: whether the application before the court in the country where the arbitration took place is bona fide and not simply a delaying tactic, whether the application before the court in that country has at least a real (i.e., realistic) prospect of success, the extent of the delay occasioned by the potential adjournment and any resulting prejudice.[55]

33. In the United States, the Court of Appeals for the Second Circuit Court provided a non-exhaustive list of factors to be considered when deciding an adjournment request in *Europcar Italia SpA v. Maeillano Tours Inc*. These factors include the general objective of arbitration (i.e. the expeditious resolution of disputes and the avoidance of protracted and expensive litigation), the status of the foreign proceedings and the estimated time for resolving those proceedings, whether the award sought to be enforced would receive greater scrutiny in the foreign proceedings under a less deferential standard of review, the characteristics of the foreign proceedings, a weighing of the possible hardship caused to the parties, and any other circumstances that could shift the balance in favour of or against adjournment.[56]

34. A similar multi-factor approach was adopted in Canada by the Supreme Court of British Columbia in *Powerex Corp. v. Alcan Inc*.[57] In this case, the Supreme Court initially adjourned the proceedings after consideration of various factors, including whether the setting aside application in the United States was frivolous,

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[54] *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[55] *IPCO v. Nigeria* (NNPC), High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[56] *Europcar Italia, S.p.A. v. Maiellano Tours Inc*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224. Subsequent decisions rendered in the United States applied these factors in determining whether or not enforcement proceedings should be adjourned: see, for example, *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, District Court, Southern District of New York, United States of America, 14 May 2003, XXVIII Y.B. COM. ARB. 127 (2003); *G. E. Transp. S.P.A. v. Republic of Albania*, District Court, District of Columbia, United States of America, 28 March 2011, 08-2042 (RMU); *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 10-0003(PLF).

[57] *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 30 June 2004, 2004 BCSC 876. See also *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096.

whether an adjournment would inordinately delay the proceedings, and whether it would not be more convenient and efficient for a court in the United States to decide questions of domestic law. When the court in the United States dismissed the application to set aside the award, the decision was appealed by Alcan, and Powerex renewed its request for recognition and enforcement of the award. The Supreme Court of British Columbia held that the party seeking an adjournment must meet the threshold test of establishing that there is a "serious issue to be tried." In weighing the balance of convenience and irreparable harm, the court noted that it should consider a number of factors, including the estimated time to complete the case in the originating jurisdiction, whether the party opposing enforcement is "merely delaying the inevitable," whether a court in the originating jurisdiction has already refused to set aside the award, the availability of security and the possibility that the party resisting enforcement would hide or disperse its assets prior to enforcement, and the willingness of the party resisting enforcement to undertake diligent prosecution of the action in the originating jurisdiction.

c. Whether there are any prevailing factors to be considered by courts

35. Although courts tend to consider the same set of factors when deciding whether to adjourn enforcement proceedings, some of them are most commonly referred to and the decision to adjourn enforcement proceedings often depends in significant part on one or two of these factors.

36. Certain courts place significant weight on the estimated time required for annulment proceedings in the country where the award was issued. The Supreme Court of Victoria held that "the determinative factor is that the adjournment will be only for a relatively short time".[58] Courts applying this factor have denied enforcement when the decision on the setting aside application was "years rather than days away",[59] and granted it when the decision was expected within a matter of days or a couple of months.[60]

37. Likelihood of success in the setting aside proceedings is also an important factor relied upon by courts in determining whether to stay enforcement proceedings.[61]

38. In the United States, a survey of the relevant case law prior and subsequent to *Europcar* suggests that courts often grant or refuse adjournments depending primarily on their assessment of the chances of success of the setting aside

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[58] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000. See also, *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096.

[59] *Far Eastern Shipping Co. V. AKP Sovcomflot*, High Court of Justice, Queen's Bench Division (Commercial Court), England and Wales, 14 November 1994, XXI Y.B. COM. ARB. 699 (1996).

[60] See *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989); *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000.

[61] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2876; Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 441 (R. Wolff ed. 2012).

proceedings in the country where the award was issued.[62] A similar approach is found in other common law countries. In *Powerex Corp v Alcan Inc.*, the Supreme Court of British Columbia emphasised the "possibility of success" factor in determining whether enforcement proceedings should be adjourned. Similarly, the English Court of Appeal noted that one of the most important factors is "the strength of the argument that the award is invalid".[63]

39. A number of courts require that the party resisting enforcement provide evidence of a reasonable chance of success of the application to set aside the award. When courts find that the proceedings to set aside the award are frivolous and dilatory, they will enforce the award in the belief that the chances of obtaining a judgment to set aside the award are remote.[64]

40. Among the courts that have adjourned enforcement proceedings, the Supreme Court of Hong Kong held in *Hebei* that the party opposing enforcement had the burden of showing that a bona fide application had been made in the Beijing court and that there were grounds on which the Beijing court could reasonably set aside the award. The party opposing enforcement did not, however, need to show that it was likely to succeed in the Beijing proceedings. On the facts of the case, the court adjourned the proceedings pending the outcome of the application before the Beijing court on the ground that there was prima facie evidence indicating that the setting aside application had some prospect of success.[65] In *Powerex Corp v. Alcan Inc.*, the Supreme Court of British Columbia adjourned the enforcement proceedings on the ground that inter alia Alcan's action to set aside the award before the Oregon court was not frivolous and had an "arguable case which [was] not bound to fail".[66] In *IPCO*, the English High Court of Justice adjourned enforcement proceedings on the ground that the setting aside application had a "realistic prospect of success".[67] In *Toyo Engineering*, the Supreme Court of Victoria held that "it could not be stated with confidence that the impeachment application is unarguable" and, after noting

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[62] See *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, District Court, Southern District of Ohio, United States of America, 9 June 1981, 517 F. Supp. 948; *Spier v. Calzaturificio Tecnica S.p.A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; *Ukrvneshprom State Foreign Economic Enterprise v. Tradeway, Inc.*, District Court, Southern District of New York, United States of America, 11 March 1996, 95 Civ. 10279, XXII Y.B. COM. ARB. 958 (1997).

[63] *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208. See also *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of First Instance, Belgium, 25 January 1996; *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999; *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd.*, High Court of Justice, England and Wales, 27 July 2011, [2011] EWHC 1957 (Comm); Oberlandesgericht [OLG] Celle, Germany, 20 November 2003, 8 Sch 02/03.

[64] Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 74.

[65] *Hebei Import & Export Corp v. Polytek Engineering Co Ltd.*, High Court in the Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725.

[66] *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096.

[67] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

the short expected duration of the setting aside proceedings, decided to adjourn the enforcement proceedings.[68]

41. While applying a similar approach, a number of courts have refused to adjourn enforcement proceedings. For example, in *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'investissements*, the Brussels Court of First Instance refused to adjourn proceedings, holding that the party opposing enforcement had not proven the existence of a "reasonable possibility of annulment".[69] Similarly, the Supreme Court of New South Wales refused to adjourn enforcement proceedings on the ground that the party opposing enforcement failed to provide "some evidence to show that there is a prima facie or reasonably arguable case" to set aside the award in the country where it was issued.[70] In Germany, the Higher Regional Court (*Oberlandesgericht*) of Celle refused to adjourn proceedings as it did not appear that the party resisting enforcement had a "prevailing interest" and the "prospects of success" of the application to set aside the award were "entirely uncertain".[71] In England, the High Court of Justice denied adjournment in *Far Eastern Shipping* on the ground that the "proceedings upon which the defendants rely to justify their application for a stay afford no more than a remote and uncertain prospect of recovery at best."[72]

42. A different approach has been adopted by some courts which have granted adjournments when the determination of the chances of success of a setting aside application involved issues of domestic law of the country where the application was pending. In *Construction Pioneers*, the United States District Court for the District of Columbia found that adjournment under article VI was proper as "for the court to decide this issue now, it would have to decide an intricate point of Ghana law that is more properly decided by a Ghana court." It held that "[i]f a final Ghanaian decision setting aside the Awards existed, the court would not be 'free as it sees fit to ignore [that] judgment'."[73] This is based on the notion that domestic courts are "better situated" to resolve domestic legal issues.[74] In the same vein, the

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[68] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000.

[69] *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of First Instance, Belgium, 25 January 1996. This decision was upheld by the Brussels Court of Appeal: see *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of Appeal of Brussels, Belgium, 24 January 1997, XXII Y.B. COM. ARB. 643 (1997).

[70] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[71] Oberlandesgericht [OLG] Celle, Germany, 20 November 2003, 8 Sch 02/03, at 554.

[72] *Far Eastern Shipping Co. V. AKP Sovcomflot*, High Court of Justice, Queen's Bench Division (Commercial Court), England and Wales, 14 November 1994, XXI Y.B. COM. ARB. 699 (1996), at 706.

[73] *CPConstruction Pioneers Baugesellschaft Anstalt v. The Government of the Republic Ghana, Ministry of Roads and Transport*, District Court, District of Columbia, United States of America, 12 August 2008, 1:04-01564(LFO); *Spier v. Calzaturificio Tecnica S.p.A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 30 June 2004, 2004 BCSC 876.

[74] *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205,

United States District Court for the Southern District of New York stated that "the limited scope of review allowed under the Convention favors deference to proceedings in the originating country on the premise that a foreign court well versed in its own law is better suited to determine the validity of the award."[75]

43. Certain commentators have argued that the appropriate standard for determining whether to adjourn enforcement proceedings under article VI of the Convention should not be the mere possibility or even the probability of inconsistent judgments, but rather a balancing of the potential harm to the parties.[76] These commentators consider that the Convention refrains from stating that the operation of article VI depends upon the chances of success of the application to set aside the award and that, in light of the Convention's objective of facilitating and expediting the recognition and enforcement of foreign arbitral awards, the enforcing court retains independent discretion to either enforce or suspend enforcement of the award.

44. This approach has been endorsed in a number of decisions in which courts have balanced factors supporting adjournment against the Convention's main goal of facilitating and expediting the enforcement of foreign arbitral awards. In the words of the Federal Court of Australia, discretion must be weighed against the obligation of the Court to pay due regard to the objectives of the Act and "the spirit and intendment of the [Convention]".[77] Similarly, United States courts have held that courts must exercise their discretion in determining whether to adjourn or stay the confirmation of an arbitral award "by balancing the Convention's policy in favor of confirming such award against the principle of international comity embraced by the Convention"[78] and that the primary goal of the Convention to facilitate the recognition and enforcement of arbitral awards should weigh heavily on the district courts' determination.[79] In *AB Götaverken v. General National Maritime Transport Co.*, the Supreme Court of Sweden refused to adjourn enforcement proceedings pending the outcome of the judicial proceedings in France, "[h]aving regard to the general aim of the New York Convention [...] to facilitate the enforcement of

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XXV Y.B. COM. ARB. 1115 (2000). See also *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[75] *Sarhank Group v. Oracle Corporation*, District Court, Southern District of New York, United States of America, 9 October 2002, XXVIII Y.B. COM. ARB. 1043 (2003).

[76] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2876; Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 443 (R. Wolff ed., 2012); W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 222 and 225.

[77] *ESCO Corp v. Bradken Resources Pty Ltd.*, Federal Court, Australia, 9 August 2011, [2011] FCA 905.

[78] *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, United States of America, 22 December 2005, 05-0423; *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[79] *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

foreign arbitral awards."[80] The President of the District Court of Amsterdam issued a similar ruling.[81]

45. This approach has been followed by a number of decisions applying a multi-factor approach — such as *Europcar Italia SpA v. Maeillano Tours Inc* (and subsequent decisions in the United States which considered the same factors)[82] — which invites courts to balance various factors in order to ascertain whether the rights of the parties are better preserved and protected through adjournment or enforcement.

C. The decision to order suitable security

46. A court that adjourns enforcement proceedings pursuant to article VI of the Convention "may also [...] order the other party to give suitable security". The Convention offers little guidance as to how this provision is to be applied, and instead provides the courts with a wide discretion to determine when to require security and in what amount and form.

47. The purpose of this provision is threefold. First, it seeks to avoid dissipation and concealment of assets pending the setting aside proceedings in the country where the award was rendered and thus guarantees that the award may be successfully enforced if the setting aside action is dismissed.[83] Second, it provides an incentive to the party resisting enforcement to proceed with its application to set aside or suspend the award "as expeditiously as possible",[84] thereby preventing delays.[85] Third, it provides the party seeking to enforce the award with adequate assurances of prompt payment once the dispute is resolved.[86]

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[80] *AB Götaverken v. General National Maritime Transport Company (GMTC), Libya and others*, Supreme Court, Sweden, 13 August 1979, VI Y.B. COM. ARB. 237 (1981).

[81] *Southern Pacific Properties v. Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[82] See e.g., *China National Chartering Corp. et al. v. Pacirans Air & Sea Inc*, District Court, Southern District of New York, United States of America, 13 November 2009, 06 Civ. 13107 (LAK); *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 28 March 2011, 10-0003 (PLF); *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[83] See *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208; *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773. See also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2877.

[84] *Continental Transfert Technique Ltd v. Federal Government of Nigeria*, High Court, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm); *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208.

[85] *Europcar Italia S.p.A. v. Alba Tours International Inc.*, Court of Justice of Ontario, Canada, 21 January 1997, CLOUT Case 366, XXVI Y.B. COM. ARB. 311 (2001).

[86] *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, United States of America, 22 December 2005, 05-0423.

a. Relationship between adjournment and security

48. Notwithstanding the discretionary power granted to courts to adjourn enforcement proceedings and order security, most courts only consider ordering the party resisting enforcement to post security in situations where they decide to adjourn enforcement proceedings. As a result, adjournment is sometimes considered as a pre-condition for the ordering of security.[87]

49. Under article VI, only the party resisting enforcement can be ordered to provide security. In one reported case, a court decided that it was "justified that the claimants give security [...] for the case of anticipatory enforcement."[88] Several years later, another court in the same jurisdiction held that the Convention offers no basis to order security from the party seeking enforcement.[89] In 1993, a court in Germany held that pursuant to article VI of the Convention, a court may only order the party resisting enforcement to provide adequate security, but not the party seeking enforcement.[90] Since then, it appears that courts have consistently refused to order the party seeking enforcement to provide security as a condition for enforcing the award.[91]

50. The fact that courts of Contracting States only consider whether to order security when contemplating adjournment does not mean that those courts should always order the party resisting enforcement to provide suitable security when an adjournment is granted.

51. In practice, courts often order security when adjourning proceedings. As stated by the English Court of Appeal, security is the price to pay for adjournment and serves to protect the party seeking enforcement.[92]

52. In *IPCO*, the English High Court of Justice held that it had jurisdiction, pursuant to section 103(5) of the 1996 Arbitration Act (implementing article VI of the Convention), to make adjournment of the decision on the enforcement of the award conditional upon the giving of security.[93] In the United States, courts also require the party opposing enforcement to provide suitable security as a condition

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[87] *Gater Assets Ltd v. Nak Naftogaz Ukrainiy*, Court of Appeal, England and Wales, 17 October 2007, [2007] EWCA Civ 988; *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[88] *Henri Lièvremont and v. Adolphe Cominassi, Maatschappij voor Industriele Research en Ontwikkeling B.V.*, President of Rechtbank, Court of First Instance of Zutphen, Netherlands, 9 December 1981, VII Y.B. COM. ARB. 399 (1982).

[89] *Southern Pacific Properties v. Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[90] Oberlandesgericht [OLG] Frankfurt, Germany, 10 November 1993, 27 W 57/93. See also *Powerex Corp., formerly British Columbia Power Exchange Corporation v. Alcan Inc., formerly Alcan Aluminum Ltd.*, Court of Appeal of British Columbia, Canada, 4 October 2004, 2004 BCCA 504.

[91] See e.g., *Gater Assets Ltd v. Nak Naftogaz Ukrainiy*, Court of Appeal, England and Wales, 17 October 2007, [2007] EWCA Civ 988; *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[92] *Yukos Oil Co v. Dardana Ltd*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[93] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

for granting an adjournment.[94] In *Nedagro*, the United States District Court for the Southern District of New York refused to require the posting of security given that the defendant had already provided "suitable security" by attaching property in the amount due.[95] In the Netherlands, the President of the District Court of Amsterdam denied a request for adjournment on the ground that the defendant "had not shown any readiness to give suitable security".[96]

53. In cases where the courts have found adjournments to be conditional on the posting of security,[97] courts have held that if the party resisting enforcement failed to provide the ordered security within the timeframe provided by the court, the court may decide to proceed with the enforcement.[98] As stated by the United States District Court for the Southern District of New York in *Spier*: "[I]f a party such as [the defendant] fails to post security, then it would seem that the proper remedy would be to deny its application for an adjournment of the decision."[99]

54. Courts in Australia and Canada have also ordered security when adjourning enforcement proceedings.[100] In *Toyo*, the Supreme Court of Victoria held that the adjournment "will be subject to an undertaking by [the party resisting enforcement] that it will diligently prosecute its application in Singapore and, further, subject to a condition that suitable security be given by it for the unpaid amount of the award including interest to the adjourned date of the enforcement application."[101]

55. This approach finds some support in the *travaux préparatoires* which state that adjournment may be granted "only on the condition that the party opposing enforcement deposits a suitable security."[102] This view is shared by some

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[94] See e.g., *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois, Eastern Division, United States of America, 12 April 2005, 04 C 773; *Nedagro B.V. v. Zao Konversbak*, District Court, Southern District of New York, United States of America, 21 January 2003, 02 Civ. 3946 (HB); *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998); *Consorcio Rive, S.A. de C.V., Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[95] *Nedagro B.V. v. Zao Konversbak*, District Court, Southern District of New York, United States of America, 21 January 2003, 02 Civ. 3946 (HB).

[96] *Southern Pacific Properties v. Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[97] *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[98] *Ingaseosas International Co. v. Aconcagua Investing Ltd.*, Court of Appeals, Eleventh Circuit, United States of America, 5 July 2012, 11-10914; *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998).

[99] *I. Martin Spier v. Calzaturificio Tecnica S.p.A.*, District Court, Southern District of New York, United States of America, 12 September 1988, 1988 WL 96839.

[100] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000. See also, *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 30 June 2004, 2004 BCSC 876.

[101] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000.

[102] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 4.

commentators who consider that, in order to safeguard the rights of the party seeking enforcement, it should always be a condition of a stay that the party resisting enforcement provides security.[103]

56. Still, in light of the permissive language of article VI, which provides that courts may, within the ambit of their discretion, decide whether or not to order security, a number of courts have, as is evidenced below, decided to adjourn enforcement proceedings without ordering security.

b. Factors considered by courts in deciding whether to order "suitable security"

57. In deciding whether to order that the party resisting enforcement give security, courts usually consider various factors, including the likelihood of success of the petition to set aside or suspend the award, the likelihood that assets will still be available if enforcement is delayed, and the relative hardship caused to the parties by the order.

58. English courts take into account the likelihood that the award will be set aside in the country where it was issued and that assets will still be available if the court decides to adjourn the enforcement proceedings. In *Soleh Boneh*, the English Court of Appeal held that two important factors must be considered: the strength of the argument that the award is invalid and the "ease or difficulty of enforcement of the award".[104] As to the strength of the award, the court stated that "[i]f the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security." A similar approach was adopted in *APIS AS v. Fantazia*.[105] In *IPCO*, the Court of Appeal overturned the lower court's decision ordering security on the basis that there was little risk of dissipation of assets and that the party resisting enforcement had a strong case in the setting aside proceedings.[106]

59. Similarly, the High Court of Hong Kong considered the same factors in *Karaha Bodas Co. v. Perusahaan Minyak Dan Bumi Negara (Pertamina)*. After noting that the uncertain merits of Pertamina's case "appear [...] to weigh in favour of KBC's application for security", the High Court turned to the difficulty of enforcement and found that requiring Pertamina to pay a substantial amount in the short period of time remaining before the enforcement hearing in Hong Kong could have a "seriously adverse and unnecessarily unjust effect on Pertamina's position", while the absence of security would have "little adverse effect on KBC's position in the Hong Kong litigation" given Pertamina's substantial assets throughout the

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[103] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2877; W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 223.

[104] *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208.

[105] *Apis AS v. Fantazia Kereskedelmi KFT*, High Court of Justice, England and Wales, 21 September 2000, [2001] 1 All ER (Comm).

[106] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

world. Accordingly, the High Court refused to order Pertamina to give security.[107] In *Hebei*, the Supreme Court of Hong Kong dismissed the application to order security on the ground that the defendant was a "substantially local company with ample assets and that there was no reason to suppose that any risk existed for the plaintiff to be protected by an order of security."[108]

60. In the Cayman Islands, the Grand Court declined to order security in light of the "impracticability" of requiring the effective provision of security by the defendant within the short period of time remaining before the decision of the Paris Court of Appeal in the setting aside proceedings.[109]

61. Courts in the United States do not assess the likelihood of the award being set aside when determining whether to order security, but rather focus on the effect a security order would have on the parties. In *Jorf*, the District Court for the Western District of Pennsylvania refused to order that the defendant give security on the ground that while there was no indication that the plaintiff had suffered financial hardship as a result of its inability to immediately enforce the award (notwithstanding that it had gone nearly a year without being able to access the money owed under the award), the security order would cause "real harm" to the defendant.[110]

62. Certain courts in the United States have assessed whether a sovereign state or its instrumentalities could be ordered to give security. In 1997, the District Court for the Southern District of New York found that article VI of the Convention allowed it to require sovereigns to post pre-judgment security if they moved to set aside or suspend an arbitral award.[111] In a recent decision, the District Court for the District of Columbia refused to require the Republic of Honduras "a sovereign state that presumably is solvent and will comply with legitimate orders issued by courts in this country or in Honduras" to post any security.[112]

c. Form and amount of the security

63. Courts determine at their own discretion the amount and form of the security to be posted by the party resisting enforcement.

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[107] *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara – Pertamina*, High Court of the Hong Kong Special Administrative Region, Hong Kong, 20 December 2002, XXVIII Y.B. COM. ARB. 752 (2003).

[108] *Hebei Import & Export Corp v. Polytek Engineering Co Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725.

[109] *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Island, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[110] *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, Unites States of America, 22 December 2005, 05-0423. See also *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[111] *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998).

[112] *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 28 March 2011, 10-0003 (PLF).

64. In most jurisdictions, courts order defendants to provide either a bank guarantee,[113] a deposit of a given amount in an escrow account,[114] a bond or other form of equally satisfactory security.[115] As noted by a commentator, courts have expressed a preference for cash paid into escrow accounts or internationally recognized instruments of payment.[116]

65. In *Spier*, the United States District Court for the Southern District of New York refused to allow the Italian party resisting enforcement to post a guarantee in an Italian Bank, holding that "the party seeking to enforce the award is entitled to security giving him a direct claim against either property or a guarantor resident in the country of enforcement", whereas the security suggested by the party resisting enforcement "could only be issued under and subject to Italian law" and would therefore be subject to "the inherent risk of further proceedings in Italy". The District Court therefore suggested that the party resisting enforcement either post a bond or issue "an irrevocable letter of credit from a bank located in New York".[117]

66. In determining the amount of the security, courts have adopted different approaches which have taken into account the expected value of the award, the solvency of the party resisting enforcement, and the disincentive effect the security would have on a party considering dilatory tactics.[118] Courts often order security in the amount of the entire award and require that any interest made on the security go to the party seeking enforcement so as to protect its economic interests.[119]

67. In England, courts rarely grant security in the full amount of the award when the award is likely to be set aside by the competent authority in the country where it was issued.[120] As stated by the Court of Appeal in *Soleh*, "if the award is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security." Similarly, the Federal Court of Australia, referring to *Soleh*, ordered the party resisting enforcement to provide "substantial security".[121]

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[113] *Apis AS v. Fantazia Kereskedelmi KFT*, High Court of Justice, England and Wales, 21 September 2000, [2001] 1 All ER (Comm).

[114] *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[115] *Consorcio Rive, S.A. de C.V., Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[116] Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 435 (H. Kronke, P. Nacimiento et al. eds., 2010).

[117] *I. Martin Spier v. Calzaturificio Tecnica S.p.A.*, District Court, Southern District of New York, United States of America, 12 September 1988, 1988 WL 96839.

[118] Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 435 (H. Kronke, P. Nacimiento et al. eds, 2010).

[119] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000; *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773; *Europcar Italia S.p.A. v. Alba Tours International Inc.*, Court of Justice of Ontario, Canada, 21 January 1997, CLOUT Case 366, XXVI Y.B. COM. ARB. 311 (2001).

[120] *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208.

[121] *ESCO Corp v. Bradken Resources Pty Ltd.*, Federal Court, Australia, 9 August 2011, NSD 876 of 2011.

In *IPCO*, the English High Court of Justice ordered security in the amount of a percentage of the award and the immediate payment of the amount that was "indisputably due".[122]

68. As to the timeframe for posting security, reported cases suggest that courts usually order the relevant party to post security within a 20-30 day period.[123] This period may be longer depending on the form of the security.[124]

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[122] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[123] *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998); *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, Unites States of America, 22 December 2005, 05-0423; *IPCO v. Nigeria (NNPC)*, High Court, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[124] See *Martin Spier v. Calzaturificio Tecnica S.p.A.*, District Court, Southern District of New York, United States of America, 12 September 1988, 1988 WL 96839: in this case, the court directed the defendant to issue a letter of credit within ninety days.